Supreme Court, U.S.
FILED

95 121 JUL 19 1995

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

AIRCRAFT BRAKING SYSTEMS CORPORATION,
Petitioner,

v.

LOCAL 856, INTERNATIONAL UNION UNITED AUTO AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS
and
AMERICAN ARBITRATION ASSOCIATION, INC.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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I

QUESTIONS PRESENTED

This Petition presents a "significant"[]...question" not yet decided by this Court, which is also the subject of conflict between the decision of the Sixth Circuit Court of Appeals in this case and the decisions of the Tenth Circuit Court of Appeals in *United Food & Commercial Workers' Int'l Union, Local 7 v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990); and, *International Union, United Mine Workers of America v. Big Horn Coal Co.*, 916 F.2d 1499, *cert. denied*, 502 U. S. 1095 (1992), *i.e.*:

Whether an employer may be lawfully ordered to arbitrate a grievance where a collective bargaining agreement has terminated, upon a finding of an "implied interim agreement to arbitrate" based upon evidence that the employees have continued to work, without striking, under the terms of the employer's unratified and implemented last contract offer.

This Petition also presents the following related question:

Whether a District Court may enter a final judgment granting a counterclaim to compel an employer to arbitrate a grievance upon evidence presented at a preliminary injunction hearing without notice by the court, as required by Rule 65(a)(2) of the Federal Rules of Civil Procedure, ordering the trial of the action on the merits to be advanced and consolidated with the hearing of the application for a preliminary injunction.

II

LIST OF PARTIES

The Petitioner is Aircraft Braking Systems Corporation ("ABSC")[1] and the Respondents are Local 856, International Union, United Auto, Aerospace and Agricultural Implement Workers ("UAW") and American Arbitration Association, Inc. ("AAA"). The AAA did not enter an appearance in the proceedings below.

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[1] a subsidiary of K & F Industries, Inc.

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LOCAL 856, INTERNATIONAL UNION UNITED AUTOAEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS
and
AMERICAN ARBITRATION ASSOCIATION, INC.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Aircraft Braking Systems Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit (App. A) is not published and the Decision of the Federal District Court for the Northern District of Ohio, Eastern Division (App. B) is not published.

JURISDICTION

The Judgment of the Court of Appeals was entered on April 21, 1995. (App. A).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The questions presented herein provide a basis for the Court's exercise of jurisdiction of this case pursuant to the Court's Rule 10. The Judgment of the Court of Appeals required ABSC to arbitrate the UAW's grievance based upon a finding by the District Court that the parties had an "implied interim agreement" to arbitrate. Petitioner submits that this judgment raises an important question of federal law which conflicts with the decisions of this Court that a party is lawfully required to arbitrate grievances only when there is an agreement so to arbitrate or a collective bargaining agreement. The Court of Appeals Decision also conflicts with decisions of the Court of Appeals for the Tenth Circuit which denied arbitrability of grievances where there was no agreement so to arbitrate in *United Food & Commercial Workers Int'l Union, AFL-CIO, Local 7 v. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990),

and; *International Union, United Mine Workers of America v. Big Horn Coal Co.*, 916 F.2d 1499, 1501-02 (10th Cir. 1990) *cert. denied*, 502 U. S. 1095 (1992).

STATEMENT OF THE CASE

Petitioner ABSC maintains its corporate headquarters in Akron, Ohio where it also operates a plant in which it manufactures aircraft wheels and braking systems. ABSC's production and maintenance employees are represented by the UAW for the purposes of collective bargaining. ABSC and the UAW were parties to a collective bargaining agreement that was terminated by its terms on August 10, 1991, and by the UAW's notice of termination as required by the terms of the collective bargaining agreement.

ABSC and the UAW commenced negotiations in June, 1991 and on August 10, 1991 there was an impasse in negotiations. In a meeting between the parties on August 10, 1991, ABSC presented a final proposal to the UAW. It was explained that the proposal was in the form of a complete collective bargaining agreement so that it could be considered by ABSC's Union employees and become effective upon ratification by the employees. It was explained that the proposal contained three annual bonuses, the first of which would become effective when the proposal was ratified. The next two bonuses were to be paid on the first and second anniversaries of ratification. The UAW rejected the proposal, which was never submitted to the employees for ratification.

ABSC implemented its final proposal. Thereafter, the UAW filed a grievance claiming that ABSC was required by the terms of the implemented proposal to pay the first annual bonus to the employees. The grievance was processed through the grievance procedure set forth in the implemented proposal. ABSC denied the grievance on the basis that there had been no ratification of ABSC's proposal, thus, there was no agreement to arbitrate grievances. The UAW certified the grievance for arbitration to the AAA. ABSC notified both the UAW and the AAA that the grievance was not arbitrable.

On April 5, 1993, the AAA notified the parties in writing that it had assigned an arbitrator and scheduled a hearing for May 17, 1993.

On April 22, 1993, ABSC filed its Complaint in Federal District Court for the Northern District of Ohio, Eastern Division requesting an injunction staying the arbitration together with a Motion for a Preliminary Injunction. A hearing was scheduled by the District Court on ABSC's Motion for a Preliminary Injunction on April 27, 1993. On the day of the hearing, the UAW filed a counterclaim to compel ABSC to arbitrate the grievance.

At the hearing for a preliminary injunction, ABSC presented evidence that there was no agreement to arbitrate. ABSC introduced evidence that the UAW promoted employee resistance to ABSC's implemented proposal. The UAW coined an acronym "FYLO", which politically correctly translates as "forget your last offer". "FYLO" signs appeared in ABSC's plant and employee's

wore T-shirts with "FYLO" on them. Groups of employees would form lines at the plant gate and march through the plant yelling, among other things, "FYLO". The UAW rented a billboard across the street from the plant entrance, which was still in place on the day of the hearing on the preliminary injunction, which read:

> "UAW 856 Needs a Fair Contract. Forget Your Last Offer. Paid for by the UAW Local 856."

ABSC discharged 33 employees for slow down of performance and the UAW filed unfair labor practice charges with the National Labor Relations Board ("NLRB"). The NLRB's Eighth Regional Office in Cleveland, Ohio, determined that the alleged unfair labor practices could be deferred to arbitration. ABSC and UAW agreed to defer to arbitration in lieu of proceeding on the unfair labor practice charges through the NLRB's hearing procedures. These deferred charges are the only issues that the parties mutually agreed to arbitrate since August 10, 1991.

The UAW argued to the District Court that; ABSC's implemented proposal was an offer for a contract, which was accepted by the UAW's conduct of working rather than striking; thus, the implemented proposal had ripened into an "implied interim contract", which included an agreement to arbitrate. The UAW's witnesses testified that there had been no strike from August 10, 1991 through the date of the hearing. The Union's witnesses, all of whom were officials of UAW Local 856, evaded ABSC's counsel's questions whether or not the UAW was bound by the no-strike clause in

the implemented proposal. While the same witnesses attempted to evade answering the question of whether or not the UAW had agreed to the terms of the implemented proposal, it was finally admitted that ABSC's final proposal had never been accepted. The UAW also argued that the arbitration of the grievances of the 33 discharged employees, pursuant to the NLRB's deferral practice, was evidence of an agreement by ABSC to arbitrate all grievances.

The hearing on ABSC's application for a preliminary injunction was concluded after approximately 2 hours of hearing and argument. Post-hearing briefs were submitted, and on Friday, May 14, 1993, the District Court rendered its Decision and Judgment denying ABSC's Motion and granting the UAW's counterclaim. The court ordered ABSC to submit to binding arbitration, scheduled for Monday, May 17, 1993. The District Court based its decision on the sole precedent of *United Paper Workers Int'l Union vs. Int'l Paper Co.*, 920 F.2d 852 (11th Cir. 1991) and held:

> Plaintiff's decision to unilaterally implement a contract is plainly an offer for "interim" employment....
>
> The conduct of both parties is consistent with a finding that an interim agreement containing a grievance-arbitration clause exists. The law recognizes the binding effect of such an agreement.

(App. B, p.37-38a)

On Monday, May 17, 1993, the grievance was arbitrated before the arbitrator appointed by the AAA.

ABSC filed its Notice of Appeal to the Sixth Circuit Court of Appeals on June 1, 1993.

On September 27, 1993, the arbitrator issued his opinion and award sustaining the grievance and ordering the payment of all three annual bonuses, the first of which was scheduled in the implemented proposal to commence with the ratification of the proposal. On November 3, 1993, ABSC filed a Complaint to Vacate The Arbitration Award, which has in effect been stayed until this case is finally resolved.

A Motion to Remand this case to the District Court was filed with the Court of Appeals on January 4, 1993 (App. C) on the grounds that the District Court's Decision was interlocutory and that new evidence had been developed in the arbitration hearing which was relevant to ABSC's position that there was no agreement to arbitrate. The Motion to Remand was denied by the Court of Appeals on March 7, 1994. (App. D).

In the Court of Appeals, ABSC presented two grounds of prejudicial error by the District Court:

1. The District Court compelled arbitration where there was neither a collective bargaining agreement in force nor an agreement to arbitrate; and

2. The District Court entered a final order on the merits, based upon a hearing for a preliminary injunction, without providing ABSC notice as required by Federal Rule of Civil Procedure 65(a)(2), and the District Court granted judgment on the UAW's counterclaim without affording ABSC the pretrial procedures provided in the Federal Rules of Civil Procedure.

The Court of Appeals sustained the District Court's order compelling arbitration holding:

> ...[T]he district courts' findings that the actions of the Union demonstrated acceptance of ABSC's "Final Proposal," namely, an implied interim contract containing an agreement to arbitrate was not clearly erroneous, and the district court properly applied the law to the facts of this case.

(App. A, p.25-26a).

The Court of Appeals also held:

> ABSC cannot show any prejudice arising from the district court's failure to give notice under Fed. R. Civ. P. 65. Therefore, error, if any, on the part of the district court is harmless error.

(App. A, p.27a).

ARGUMENT

1. Certiorari Should Be Granted To Determine Whether A Grievance Is Arbitrable Pursuant To An "Implied Interim Agreement" Where The Employees Continue Working Under The Terms Of The Employer's Implemented Final Offer For A Contract.

Early in the development of the federal labor law, this Court established the foundation of mandatory arbitration of grievances by assigning the courts the responsibility to determine the issue of arbitrability. *United Steelworkers of America v. American Manufacturing Company*, 363 U. S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 547 (1960); and *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U. S. 593 (1960). This Court also established the principle that:

> ...[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute he has not agreed so to submit.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U. S. at 582.

Since the Steelworkers' Trilogy, this Court has continuously fashioned a clear and precise body of law providing guidance to the lower courts and the parties regarding the separation between the role of the judiciary and the role of the arbitrator in labor

arbitration. The pivotal issue is the question of arbitrability and this Court has consistently held that a party should not be compelled to arbitrate where there is no agreement so to submit the dispute to arbitration. In *Gateway Coal Co. v. Mine Workers*, 414 U. S. 368 (1974), the Court held:

> No obligation to arbitrate a dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so.

Id. at p. 374.

In *A. T. & T. Technologies v. Communications Workers*, 475 U. S. 643 (1986), the Court stated:

> The first principle gleaned from the Trilogy is that "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."

Id. at p. 648.

The only cases in which this Court has affirmed an appellate court's decision of arbitrability, where there was no collective bargaining agreement in effect, are *John Wiley & Sons v. Livingston*, 376 U. S. 543 (1964); and *Nolde Bros, Inc. v. Bakery Workers*, 430 U. S. 243 (1977). Both cases involved expired contracts. Subsequent to the expiration of the collective bargaining agreements, when there was no agreement

in force, the unions filed grievances alleging breaches arising under the expired agreements. In both cases, this Court found the grievances were arbitrable. In *Nolde* this Court said:

> ...[T]he parties obligations under their arbitration clause survived contract termination when the dispute was over an obligation arguably created by the expired agreement.

430 U. S. at 252.

But in *Litton Financial Printing Division v. NLRB*, 501 U.S.___, 115 L.Ed 2d 177 (1991), this Court clarified its decision that *Nolde Bros.* applies only where a dispute has its real source in a contract and that:

> [N]o obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he is contracted to do so. *Gateway Coal Co. v. The Mine Workers*, 414 U. S. 368, 374 (1974). We reaffirm today that under the NLRA, arbitration is a matter of consent, and that it will not be imposed upon the parties beyond the scope of their agreement.

115 L.Ed 2d 193.

Most recently, in *First Options of Chicago, Inc. v. Kaplan, et al.*, Case No. 9450, 514 U. S. _____, 1995 U. S. LEXIS 3463, this Court reaffirmed the principle

that arbitration is a matter of contract, and that the courts should not "assume that the parties agreed to arbitrate...unless there is a 'clear and unmistakable evidence' that they did so."

Thus, from 1960 through 1995, since the Steelworkers Trilogy laid the foundation for the federal common law of arbitration, to the present day in *First Options of Chicago*, this Court has instructed the parties, lawyers and the lower courts that the duty of the courts in arbitration matters is very narrow. While the courts are to defer to the arbitrator in deciding the merits of a grievance, the courts are to decide whether a grievance is arbitrable and the predicate upon which arbitrability is based is the existence of an agreement to arbitrate.

The Court of Appeals for the Sixth Circuit followed a holding of the Court of Appeals for the Eleventh Circuit in *United Paper Workers Int'l Union v. Int'l Paper Co.*, 920 F.2d 852 (11th Cir. 1991) that a grievance was arbitrable where the employer and the union were working under the terms of the employer's implemented proposal. The employer in *Paper Workers* maintained there was no agreement with the union containing an agreement to arbitrate, but the Eleventh Circuit found that there was an agreement based on the union's commitment to the employer that the union would not strike without a ten day notice. The Eleventh Circuit reasoned that the Union's continuation of work with a promise not to strike without a ten day notice was an acceptance of the employer's implemented offer, which contained a provision for arbitration.

In this case, the Sixth Circuit held that ABSC was obligated to arbitrate the UAW's grievance based upon evidence of an "implied interim agreement containing an agreement to arbitrate." That evidence was: The UAW did not call a strike after ABSC implemented its final contract proposal; the UAW Executive Bargaining Committee Chairman testified that the Union had no plans to call a strike in the future; and, ABSC had arbitrated grievances under the arbitration procedures of the implemented proposal. (App. A, p.23-24a). Arguably, the holding would be the same even if the proposal had been submitted for ratification and rejected by the full membership.

The evidence that the employees continued to work and that the UAW had no plans to strike in the future is immaterial to the issue whether there was an agreement to arbitrate. But the District Court said it amounted to an acceptance of an agreement for an interim period while the Union sought to negotiate more advantageous terms. Thus, an interim agreement was implied and that agreement contained an arbitration procedure. (App. B, p.37-38a).

The Court of Appeals agreed with the District Court, however, the concept of an "implied interim agreement" makes no sense. The UAW and the employees have promised nothing nor committed themselves to do anything. The employees simply continued to work and the UAW made no plans to call a strike. If such conduct reaches the level of agreement by conduct, it is, at best, an illusory agreement for the UAW for the employees can strike at any time.

A third factor, upon which the District Court and the Court of Appeals relied was that ABSC had arbitrated 33 grievances. That is an over-simplification of what the evidence involved. The arbitrations arose from the UAW's unfair labor practice charges concerning the discharge of 33 employees. The NLRB determined that the charges could be resolved by arbitration. The NLRB's deferral policy requires that both parties to the dispute agree to arbitration in lieu of proceeding with unfair labor practice hearings. *U.S. Postal Service*, 225 NLRB 220, 93 LRRM 1089 (1976); *Pilot Freight Carriers*, 224 NLRB 341, 92 LRRM 1338 (1976). Thus, the UAW and ABSC mutually agreed with the NLRB to defer the resolution of the charges to arbitration in their mutual interest to avoid protracted litigation. This was an agreement between the parties, arranged by the NLRB, to arbitrate specific grievances. However, that agreement did not extend beyond the dispute concerning the discharges. It was a specific agreement to arbitrate specific grievances, which cannot support a finding that ABSC had entered into an agreement to arbitrate all grievances under the implemented proposal.

In *Gateway Coal Co.* and *Litton* this Court said: "No obligation to arbitrate a dispute arises solely by operation of law," *supra*. If ever an employer was ordered to arbitrate a grievance solely by operation of law, it is clearly ABSC in this case.

This Court should grant certiorari on this issue for a number of reasons. First, and most imperative, is whether an "implied interim agreement" satisfies this Court's requirement that an employer cannot be

compelled to arbitrate a grievance unless there is an agreement so to arbitrate. Most lawyers can understand what constitutes an "agreement". Most agreements involving labor arbitration are collective bargaining agreements. However, there obviously can be agreements to arbitrate only a specific dispute and such agreements need not be in writing. Nonetheless, whether written or verbal, there is sufficient law to provide substantial uniformity for a definition of an "agreement."

But, if parties are to be ordered to arbitrate based upon "implied interim agreements", the relative certainty that prevails pursuant to this Court's prior decisions will cease. There are no legal definitions of an "implied interim agreement". There is no common understanding of what an "implied interim agreement" is and much litigation is sure to be created by disputes over what constitutes an "implied interim agreement" to arbitrate. Further, the requirement of a clear agreement between parties to arbitrate will be extinguished.

Another consideration in support of granting certiorari are the rights of the parties beyond the particular grievance and arbitration involved in this litigation. Is the "implied interim agreement" in this case in force only for the purposes of arbitrating the grievance in dispute? Or, is it in force until the parties reach a real agreement, such as a collective bargaining agreement?

It appears that ABSC is bound by the interim implied agreement to arbitrate forever. The District

Court has, since the Decision by the Court of Appeals, vacated an arbitrator's finding, with regard to another grievance, that there was no agreement between the parties to arbitrate the grievance. Another judge in the District Court vacated that arbitrator's award on the grounds that this case is *res judicata* with regard to ABSC's obligation to arbitrate grievances.

Another consideration are the rights of ABSC during the term of an implied interim agreement. If the UAW chooses to strike rather than arbitrate a dispute, will the federal courts recognize the interim implied agreement as the basis for injunctive relief? In *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970), this Court provided for injunctions against strikes, as an exception to the prohibition against labor injunctions in the Norris-LaGuardia Act, "only (in) the situation in which a collective-bargaining agreement contains a mandatory grievance adjustment for arbitration procedure." *Id.* at p. 253. As the law now stands, ABSC would not be entitled to injunctive relief as it is a party only to an interim implied agreement and not a collective bargaining agreement.

The finding of arbitrability based upon an "implied interim agreement" is at least a new concept of the type of agreement necessary to compel arbitration. It is respectfully submitted that this Court should grant certiorari to clarify the state of this vital labor relations issue.

Finally, there is also a conflict between the Decisions of the Sixth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals and the Decisions of

the Tenth Circuit Court of Appeals in *United Food & Commercial Workers Int'l Union, supra*, and; *International Union, Mineworkers v. Big Horn Coal Co.*, 916 F.2d 1499, 1501-02 (10th Cir. 1990), *cert. denied*, 502 U.S. 1095 (1992). The Tenth Circuit declined to order the arbitration of grievances in both cases where the unions continued to work under the terms of the employer's implemented agreement. The Tenth Circuit rejected the unions' claim of an interim agreement to arbitrate and held that the unions had ignored that the National Labor Relations Act provides the Court jurisdiction over suits for violation of "contracts". As the company's last offer is not a contract, the Court held it was without jurisdiction to refer the cases to arbitration. 897 F.2d at pp. 1026-1027; 916 F.2d at pp. 1501-1502.

2. Certiorari Should Be Granted To Determine The Remedy Available To The Plaintiff Where A District Court Ignores Federal Rule Of Civil Procedure 65(a)(2) In Failing To Notify The Parties Prior To Entering Final Judgment Denying An Injunction Based Upon The Record Of Proceedings Pursuant To An Application For A Preliminary Injunction.

Federal Rule of Civil Procedure 65(a)(2) provides in pertinent part:

> (2) **Consolidation of Hearing With Trial on Merits.** Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application....

In this case, the District Court did not provide an order as required by the Rule before entering a final judgment denying an injunction to stay arbitration following a hearing on ABSC's application for a preliminary injunction. In the Court of Appeals, ABSC raised the District Court's failure to comply with Rule 65(a)(2) as prejudicial error. The Court of Appeals held that ABSC had failed to identify the evidence it would have introduced if given notice and was thereby not prejudiced by the District Court's failure to follow the Rule.

ABSC stated in its appellate brief that it had new evidence to offer. During oral argument, counsel for ABSC informed the Court that, in the arbitration proceedings that followed the District Court's Order, ABSC adduced evidence that proved that the UAW had always maintained its right to strike while the parties were working under the terms of the implemented order. That evidence consisted of the testimony of the UAW's international representative, who represented the International Union at the negotiations, that the UAW was neither bound by the no strike clause in the implemented proposal nor would the UAW agree that it would not strike during the term of the implemented proposal. This evidence was also identified in ABSC's Motion To Remand the case to the District Court. (App. C).

The Decision of the Court of Appeals also states that the UAW represented to the Court of Appeals that ABSC had waived its right to present additional evidence by filing a post-hearing brief. That representation is not accurate.

Based upon the foregoing, the Court of Appeals ruled that the District Court's failure was harmless error. (App. A, p.26-30a). Inasmuch as the Sixth Circuit and the District Court made their decisions based, in large part, upon the testimony of the Local UAW officers, which testimony fell short of saying that the UAW was either bound to the no strike clause or would commit to not strike, the evidence of the International Representative carries substantial weight in support of ABSC's position. ABSC has been greatly prejudiced by the Court of Appeals refusal to allow ABSC the procedures provided in Rule 65 and the Rules of Discovery.

There is scarce authority interpreting the effect of a District Court's failure to comply with Rule 65(a)(2). This Court has addressed the issue only in *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), wherein it stated:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary injunction hearing, *Progress Development Corp. v. Mitchell*, 288 F.2d 222 (CA7 1976), and the findings of fact and conclusions of

law made by a court granting a preliminary injunction are not binding at trial on the merits, *Industrial Bank of Washington v. Tobriner*, 132 US App DC 51, 54, 405 F.2d 1321, 1324 (1968); *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (CA2 1953). In light of these considerations, it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits. *E.g., Brown v. Chote, supra; Gellman v. Maryland*, 538 F.2d 603 (CA4 1976); *Santiago v. Corporation de Renovacion Urbana y Vivienda de Puerto Rico*, 453 F.2d 794 (CA1 1972).

Should an expedited decision on the merits be appropriate, Rule 65(a)(2) of the Federal Rules of Civil Procedure provides a means of securing one. That Rule permits a court to "order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." Before such an order may issue, however, the courts have commonly required that "the parties should normally receive clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." *Pughsley v. 3750 Lake Shore Drive Cooperative Bldg.*, 463 F.2d 1055, 1057 (CA7 1972); *Nationwide Amusements, Inc. v. Nattin*, 452 F.2d 651 (CA4 1971)

This Court did not decide whether the lower court's failure to follow the Rule was prejudicial error as the case was moot for other reasons. However, in the two appellate decisions cited by this Court in *Camenisch – Pughsley v. 3750 Lake Shore Drive Cooperative Bldg.*, 463 F.2d 1055, 1057 (CA7 1972); *Nationwide Amusements, Inc. v. Nattin*, 452 F.2d 651 (CA4 1971) – the appellate courts found that the parties should have been given advance notice and an opportunity to respond. In *Pughsley*, the Court held that the parties should have been "given a clear opportunity to object, or to suggest special procedures, if a consolidation is to be ordered." 463 F.2d at p. 1057. In *Nationwide Amusements, Inc.*, the Court of Appeals held that:

> Although we do not believe a formal written "order" is required by the Rule, the term "order" at least requires some form of notice to the parties that their final day in court has come.

452 F.2d at p. 652.

In both cases, the final judgment on the merits were reversed and the cases remanded to the district court for further proceedings.

ABSC went through the procedures and hearing for a preliminary injunction unaware that the Union would claim that there was some form of agreement between the parties, or, that it would be found to have an obligation to arbitrate pursuant to a theory of an "implied interim agreement." As the District Court failed to give ABSC some notice that a judgment would

be entered on the merits, ABSC was not given the opportunity to prepare to rebut the surprises presented both by the UAW's testimony and the District Court's finding, on the evidence presented at the hearing for a preliminary injunction, that ABSC was obligated to arbitrate pursuant to an "implied interim agreement."

As a result of the incomplete evidentiary proceedings and the amorphous theory of an obligation to arbitrate pursuant to an "implied interim agreement", there is great confusion as to what the "implied interim agreement" requires of ABSC. Are the orders of the Court of Appeals and the District Court effective only with regard to the grievance involved in this case? How long is the "implied interim agreement" in force? It contains no expiration date and the parties still do not have a real collective bargaining agreement. Can the implied interim agreement be utilized to enjoin a strike?

While this case was on appeal to the Court of Appeals, another dispute arose concerning the arbitration of another grievance. The AAA again scheduled a hearing, over ABSC's objection, and ABSC filed a Complaint to enjoin the arbitration of the grievance. The case was styled as *Aircraft Braking Systems Corporation v. United Automobile, Aerospace & Agricultural Workers of America, UAW, et al.*, United States District Court for the Northern District of Ohio, Eastern Division, Case No. 5:94 CV 0496 ("Case No. 0496") and assigned to another District Court Judge. ABSC filed an Application For a Preliminary Injunction which was heard in a brief hearing before the District Court on April 1, 1994. There were two grievances involved in the hearing. The District Court stayed one of the

grievances on the grounds that the parties had themselves agreed in writing to stay the processing of the grievance pending the resolution of another matter. The District Court denied the preliminary injunction on the remaining grievance on April 4, 1994. (App. E). There was no order advancing the case on the merits for a final decision and the District Court's Order ruled only that: "The Court will not enjoin the arbitration of Grievance #A-8712 (April 28, 1994)." (App. E, p.51a).

ABSC and the UAW thereafter engaged in four days of hearing in arbitration. The arbitrator heard both the issue of arbitrability and the merits of the grievance. The arbitrator made no ruling on the merits because he held that the grievance was not arbitrable as the parties had no agreement to arbitrate. (App. G).

ABSC filed a Motion to Confirm the resulting Arbitration Award in Case No. 0496 and the UAW filed a Motion to Vacate the Arbitration Award. On June 15, 1995, the District Court ordered the vacation of the arbitration award on the grounds that the District Court's prior Order (in this case) was *res judicata* and collaterally estopped the arbitration of the issue of arbitrability. (App. F, p.72-73a).

ABSC does not intend herein to argue the merits of Case No. 0496, which is the subject of a separate appeal to the Court of Appeals, however, it is related to the issues contained in this Petition as the Decision of the Court of Appeals in this case was held to be dispositive of the issue of arbitrability in Case No. 0496. Based on the evidence in a hearing on the preliminary injunction on a single grievance in this case, the effect of the

Decision of the Court of Appeals is that ABSC, which has no collective bargaining agreement with the UAW, is locked into an obligation to arbitrate the UAW's grievances indefinitely pursuant to an "implied interim agreement" to arbitrate. And, if the UAW chooses to strike rather than arbitrate a future grievance, it is questionable whether ABSC would be able to obtain injunctive relief as there is no collective bargaining agreement between ABSC and the UAW. Further, the decision has effectively granted the UAW two weapons in its economic arsenal – the right to arbitrate and the right to strike. Both are unilateral rights and are not mutually exclusive. If unsatisfied with the outcome of the first, the UAW can freely invoke the second.

ABSC submits that had there been the opportunity for a full hearing on the merits, preceded by discovery pursuant to the Federal Rules of Civil Procedure, a complete record of the evidence may have prevented the chaotic situation that now prevails between the parties. Regardless of the final results of this litigation, the judgment might have been based upon the evidence and not upon the fiction of an "implied interim agreement."

By accepting this Petition, this Court will resolve two important labor arbitration questions:

1. Whether an employer is obligated to arbitrate grievances, in the absence of an agreement to do so, when the Union and employees work under terms unilaterally implemented by the employer, and;

2. Whether a district court must afford a party notice of the district court's intent to enter judgment on the merits upon evidence presented in support of an application for a preliminary injunction and provide an opportunity to present additional evidence and arguments.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

No. 93-3614

UNITED STATES COURT OF APPEAL

FOR THE SIXTH CIRCUIT

AIRCRAFT BRAKING SYSTEMS CORPORATION,	)	
Plaintiff-Appellant,	)	
v.	)	ON APPEAL FROM THE UNITED STATES
LOCAL 856, FOR INTERNATIONAL, UNION, UNITED AUTO, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS,	)	DISTRICT COURT THE NORTHERN DISTRICT OF OHIO
Defendant-Appellee,	)	
AMERICAN ARBITRATION ASSOCIATION, INC.	)	
Defendant.	)	

No. 93-3614
Aircraft Braking Sys. v. UAW Local 856

BEFORE: MILBURN and RYAN, and GODBOLD*, Circuit Judges.

MILBURN, Circuit Judge. Plaintiff Aircraft Braking Systems Corporation ("ABS") appeals the district court's order denying its motion for a preliminary injunction and granting the counterclaim of defendant, Local 856, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America ("Union"), to compel arbitration of a labor grievance. On appeal the issues are (1) whether the district court erred in finding that there was an enforceable interim agreement between the parties which required arbitration of their labor dispute and (2) whether the district court erred in entering a final order based upon the Union's application for a preliminary injunction without giving notice of advancement and consolidation for trial on the merits. For the reasons that follow, we affirm.

I.

A.

This case involves a labor dispute between ABS and defendant Union. The Union is the certified bargaining representative for ABS's production and maintenance employees. ABS and the Union were parties to a collective bargaining agreement which, by its own terms, expired on August 10, 1991. Prior to the

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*Honorable John C. Godbold, United States Circuit Judge for the Eleventh Circuit sitting by designation.

August 10, 1991 expiration of the collective bargaining agreement, ABS and the Union entered into negotiations for a new agreement; however, they were unable to reach agreement on the terms of a new collective bargaining agreement.

On August 10, 1991, ABS informed the Union that it was implementing the terms of its "Final Proposal" to the Union, on the grounds that the parties had reached an impasse in their bargaining. The "Final Proposal" stated in relevant part:

> The Contract between U.A.W., Local #856 and Aircraft Braking Systems Corporation which by its terms expires at 6:00 PM August 10, 1991, is hereby extended and renewed for a period of three years from August 10, 1991, or the date of ratification whichever is later except as specifically amended hereafter.
> . . .
>
> 3. Employees on the active payroll as of August 10, 1991, shall receive a lump sum payment of $800.
> . . .
>
> 14. All Company proposals dated June 20, 1991, and all tentative agreements will be incorporated into the Basic Labor Agreement . . . except as

modified by the attached Company proposals.

J.A. 17-18; 57-58.

The existing collective bargaining agreement between the parties, which expired on August 10, 1991, contained both an arbitration clause and a no-strike clause. One of the proposals made by ABS on June 20, 1991 was to change paragraph 193 of the existing collective bargaining agreement to read:

> The parties to this agreement will utilize the services of the American Arbitration Association when the need for arbitration arises.

J.A. 59.

This resulted in a unilaterally imposed "Final Proposal" which reads in relevant part:

> Section 2. Grievance Procedure
>
> . . .
>
> Step 4
>
> It is hereby agreed that should the above procedure fail to bring about an agreement between the parties with respect to certain grievances, either party may within twenty (20) working days after the final written answer as outlined in the

agreement above submit the issue to an arbitrator, selected by mutual agreement.

. . .

181 The parties to this agreement will utilize the services of the American Arbitration Association when the need for arbitration arises.

. . .

184 Specifically the Arbitrator shall not have the power to arbitrate general wage levels or maximum or minimum rates of existing classifications, and the only grievances which may be submitted to the said Arbitrator for hearing and determination shall be those arising out of alleged violation or misinterpretation of the provisions of this agreement; or individual rate grievances with the employee's classification (classification in this instance shall include the subdivision).

. . .

ARTICLE V. WORK STOPPAGE

Section 1. No Strike or Lockout

203 It is the express desire of the parties to this Agreement that the procedures contained herein will serve the purpose of

> affecting a peaceable settlement of all disputes that may arise between them. As long as this Agreement is in effect, the Company will not lock out any employees. As long as this Agreement is in effect, the Union will not cause or permit its members to cause, nor will any employee take part in any strike, sit-down, stay-in or slow-down, or any curtailment of work or restriction of production, or picketing, or interference with production of the Company in any matter which comes within the jurisdiction of the Arbitrator.

J.A. 199, 201-03, 206.

Subsequently, on September 3, 1991, the Union filed a grievance, grievance A-8700, with ABS, claiming that plaintiff violated the unilaterally implemented contract by refusing to pay the $800 lump sum payment promised in paragraph 3 of the "Final Proposal." J.A. 19. Moreover, although the member of the Union declined to ratify the unilaterally imposed "Final Proposal" of ABS, and an impasse was reached, they continued to work under the terms of the Final Proposal: and were paid wages and benefits pursuant to the "Final Proposal." Furthermore, it is undisputed that there has been no strike since the August 10, 1991 implementation of ABS's "Final Proposal."[1]

---

[1]On August 11, 1991, the Union filed an unfair labor practices charge against ABS with the National Labor Relations Board ("NLRB").

B.

On April 22, 1993, ABS filed a complaint and an application for a temporary restraining order seeking a declaratory judgment under 9 U.S.C.§ 2, 28 U.S.C. § 2201, 29 U.S.C.A. §§ 101, 160(b), and Federal Rule of Civil Procedure ("Fed. R. Civ. P." 65), that grievance A-8700 did not involve an arbitrable controversy and that grievance A-8700 was time barred. It also sought temporary and permanent injunctive relief enjoining the Union from proceeding to arbitration on grievance A-8700. On that same date, ABS also filed a separate motion for a preliminary injunction against the arbitration of grievance A-8700.

Edward L. Searle, Director of Human Resources for ABS, testified at the hearing in district court that his responsibilities at ABS included total responsibility for "labor relations, grievance resolution, bargaining, benefits administration, and training." J.A. 107-08. Searle testified that on August 10, 1991, he presented a copy of ABS's "Final Proposal" to the Union's Executive

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The unfair labor practices charge stated that, among other things, that one of the actions taken by ABS which constituted an unfair labor practice was "[i]mplementing a final offer prior to the existence of a good faith bargaining impasse." J.A. 20. The Union withdrew its unfair labor practices charge with the NLRB on or about December 6, 1991. This unfair labor practices charge was eventually settled in part. J.A. 122. The settlement "referred to the . . . charge [of] dealing directly with employees while bypassing the union, under threat of plant relocation." J.A. 125.

Bargaining Committee, that he indicated to the Executive Bargaining Committed [sic] that as a result of meetings between ABS and the Union, ABS believed that the parties had reached impasse in their negotiations for a new collective bargaining agreement, and that ABS would implement its "Final Proposal" at 6:01 p.m. on August 10, 1991. Searle testified that at the August 10, 1991 meeting with the Executive Bargaining Committee, he went through the items in the "Final Proposal," one by one, and that he indicated to the Executive Bargaining Committee that the "items related to lump sum payments were contingent on ratification and we would not process any lump sum payments until the contract had been ratified." J.A. 110. Searle also testified that on or about October 1, 1991, he sent a letter to Don Hurr, the Chairman of the Executive Bargaining Committee of Local 856, indicating that it was obvious to ABS that the Union was not going to ratify ABS's "Final Proposal" and that ABS was going to proceed to implementation of its "Final Proposal" without ratification. Searle further testified that in the letter he reminded the Executive Bargaining Committee that the lump sum payments set forth in the "Final Proposal" would not be made until after ratification by the Union.

Searle described the four step grievance procedure set forth in ABS's "Final Proposal". The first step of the grievance procedure involves an oral grievance made at the floor level with the chief steward and the supervisor. If the grievance is not resolved at the floor level, it proceeds to step 2 where the grievable issue is addressed between the Union Committee Person and

ABS's Department Manager. If the grievance is not resolved at step 2, it proceeds to step 3. At step 3, the Union's Executive Bargaining Committee reviews the matter, and if they feel it has merit, they write a formal grievance which is presented to ABS, at which time a step 3 meeting is held. ABS has ten days to give a written answer to the union. Once the written answer is issued by ABS, the Union has 20 days to certify the grievance to arbitration, which is step 4 of the procedure. J.A. 115.

Searle testified that he received a copy of grievance A-8700 on September 5, 1991, that grievance A-8700 was written by the Executive Bargaining Committee, that it was presented to the company, that it was addressed in a step 3 meeting, that it was answered, and the Union certified the grievance to arbitration. Specifically, on November 18, 1991, Searle sent another letter to Don Hurr in which he indicated that a step 3 meeting on grievance A-8700 had been held on November 6, 1991. The letter further stated that:

> It continues to be the position of the Company that the payment of the $800 lump sum is contingent upon the ratification of the Contract. As of this date the Contract has not been ratified. Consequently, Grievance A-8700 is denied.

J.A. 33.

Finally, on direct examination, Searle testified that in September 1992, he received notification from the Union that it was going to seek an arbitrator to hear grievance A-8700. J.A. 116. Searle stated that on March 3, 1993, he received a letter from the American Arbitration Association ("AAA"), requesting that the Union and ABS indicate their choice of an arbitrator from a list of arbitrator's names which had been enclosed along with the letter. Thereafter, on March 8, 1992, Searle sent a letter to AAA stating ABS's position that the $800 lump sum payment was not a proper issue for arbitration and indicating that ABS would not respond to AAA's request for identification of arbitrators. Subsequently, on March 16, 1993, and again on April 1, 1993, AAA sent a letter to ABS and the Union, indicating that "in the absence of an agreement by the Parties or a court order staying this matter," AAA would proceed to arbitration. J.A. 28, 30.[1]

On cross-examination, Searle admitted that grievance A-8700 was filed and certified in a timely manner. J.A. 138. Searle also admitted that ABS and the Union had an arbitration, pursuant to the grievance procedure set forth in ABS's "Final Proposal", scheduled for the day after the hearing. Searle further admitted that ABS had arbitrated other grievances with the Union since August 10, 1991. According to Searle, "[w]e went to arbitration on one grievance, and as a result of working

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[1]The letter of April 1, 1993, also indicated that AAA had selected John E. Drotning to serve as the arbitrator for grievance A-8700. J.A. 30.

with the Arbitrator we resolved 30 grievances." J.A. 145. In addition, Searle admitted that through AAA, an arbitrator by the name of Nicholas Duda had been selected as an arbitrator to hear the grievances. J.A. 145. Moreover, Searle admitted that ABS had agreed to arbitrate approximately 33 grievances, because the NLRB decided to defer to the arbitration process set forth in the "Final Proposal". Finally, Searle admitted that in September of 1992, when the Union wrote to him and told him that they were certifying grievance A-8700 for arbitration, he did not tell the Union that the grievance was not arbitrable.

Donald Hurr, the chairman of the Executive Bargaining Committee of Local 856, also testified at the hearing. Hurr testified that "[i]t was never brought across the [bargaining] table that there was a precondition for the [$]800 [lump sum payment]." J.A. 155. Hurr further testified that after the Union filed grievance A-8700, ABS's response was "if you ratify the contract we'll give you the $800." J.A. 155-56. According to Hurr, he was never informed at any time prior to March of 1993, that ABS believed that grievance A-8700 was not arbitrable. However, Hurr admitted that as of October 1991, he was aware of ABS's position concerning payment of the lump sum payments.

Hurr also testified that after ABS implemented the terms of its "Final Proposal," the union members continued working. Hurr further testified that there has been no strike at ABS since August 10, 1991, and that a strike was not contemplated in the future. Finally, Hurr

testified that the Union "had not signed a contract" with ABS, but that the Union continues to follow the terms of its "Final Proposal" except for the payment of the $800 lump sum. J.A. 161, 164.

On May 14, 1993, the district court denied ABS's application for a preliminary injunction and granted the Unions's counterclaim, ordering ABS to submit grievance A-8700 to binding arbitration. In its order, the district court made detailed findings of fact, concluding that

> every tangible indicia of the intent of the parties shows that both sides believed and behaved according to the view that a grievance-arbitration agreement was in force between the parties. It is impossible for this court to conclude otherwise. . . .
>
> [ABS's] decision to unilaterally implement a contract is plainly an offer for "interim" employment. . . . acceptance of such an offer is manifested by continuing performance. The unilateral offer contained as one of its terms an agreement to arbitrate grievances.
> . . .
>
> Plaintiff's unilateral offer for interim employment was accepted. . . . the union has agreed to comply with the terms of interim employment while continuing to seek a more advantageous permanent

> agreement. . . . Most telling of all, the employees have continued to work for over 20 months under the imposed terms without violation of the no-strike clause.
>
> . . .
>
> In sum, an agreement to arbitrate does exist and the instant grievance [A-8700] is within the terms of that arbitration agreement.

J.A. 294-96. This timely appeal followed.[2]

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[2]Subsequently, grievance A-8700 was arbitrated and the arbitrator issued an award in favor of the Union. ABS filed a second action in the district court, seeking to have the arbitrator's award vacated. Thereafter, on January 8, 1994, ABS filed a motion with this court seeking to have this case remanded to the district court, for consolidation and trial with this action to vacate the arbitrator's award. It was ABS's position that the district court's order compelling arbitration was an interlocutory order. In an order dated March 7, 1994, we concluded that "the district court's order compelling arbitration is final," and we denied the motion to remand. *See Aircraft Braking Sys. Corp. v. Local 856, Int'l Union, United Auto, Aerospace and Agricultural Implement Workers*, No. 93-3614 (6th Cir. Mar. 7, 1994)(order).

II.

A.

ABS argues that the district court abused its discretion in both denying ABS's motion for a preliminary injunction staying the arbitration of grievance A-8700 and in granting the Union's motion to compel binding arbitration of grievance A-8700. ABS asserts that the district court erred in finding that the Union manifested its acceptance of ABS's unilateral offer of "interim" employment in its "Final Proposal" by abiding by the terms and conditions of employment set forth in the "Final Proposal" and by abiding by the no-strike provision set forth in the"Final Proposal." ABS further asserts that because it "*unilaterally* implemented its ["Final Proposal"] incorporating terms and conditions of employment under which the parties have been working since August 10, 1991," the provisions in the "Final Proposal"have never been implemented because they have never been ratified by the Union's membership. Brief of Appellant at 10.

"A meeting of the minds of the parties must occur before a labor contract is created." *Bobbie Brooks, Inc. v. International Ladies Garment Workers Union*, 835 F.2d 1164, 1168 (6th Cir. 1987). "Whether a collective bargaining agreement exists is a question of fact; [the] technical rules of contract law are not strictly binding." *Id* (Citing *National Labor Relations Bd. v. Truckdrivers. Chauffeurs and Helpers, Local Union No. 100, Int'l Bhd. Of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 532 F.2d

569, 571 (6th Cir.), *cert.denied*, 429 U.S. 859 (1976). A district court's "finding that a valid contract exists will not be set aside unless it is clearly erroneous." *Id.* (Citing *Trustees of Atlanta Iron Workers Local 387 Pension Fund v. Southern Stress Wire Corp.*, 724 F.2d 1458, 1459 (11th Cir. 1983) (per curiam). "This factual determination will be deemed clearly erroneous only where it is against the clear weight of the evidence or when, upon review of the evidence, the appellate court 'is left with the definite and firm conviction that a mistake has been committed.'" *Id.* (Quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). "'If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" *Central States Southeast and Southwest Areas Pension Fund v. Kraftco*, 799 F.2d 1098, 1109 (6th Cir. 1986), *cert.denied*, 479 U.S. 1086 (1987) (en banc) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985)). Further, ever greater deference is accorded to a district court's findings based upon witness credibility, "'for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in [what] is said.'" *Id.* (quoting *Anderson*, 470 U.S. at 575).

In this case, the district court was called on [sic] determine whether ABS and the Union were required to arbitrate their dispute concerning the $800 lump sum payment set forth in ABS's "Final Proposal." "Arbitration is a preferred method of settling labor disputes.'"

Cincinnati Typographical Union No. 3, Local 14 519, Communications Workers of America, AFL-CIO v. Gannett Satellite Information Network, Inc., 17 F.3d 906, 909 (6th Cir. 1994) (citing 29 U.S.C.§ 173(d)). However, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. "A party's agreement to arbitrate is a matter of contract construction and whether a dispute is arbitrable under a collective bargaining agreement is a question of law for the court." *Cumberland Typographical Union No. 244 v. Times and Alleganian Co.*, 943 F.2d 401, 404 (4th Cir. 1991). Moreover, "[i]f the court determines that the matter in dispute is a matter designated for arbitration by the parties in their contract, Section 301(a) of the LMRA allows the specific enforcement of the arbitration agreement." *Id.* (Citing *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 450-51 (1957)).

The Supreme Court has set forth four principles as a guide to determine whether a labor dispute is arbitrable:

> Under the first principle, the parties must have contracted to submit the grievance to arbitration. The second principle requires that the court determine whether the contract provides for arbitration of the particular grievance in question. The third principle demands that the court not decide the merits of the grievance while determining the arbitrability of the

> dispute. Finally, if the contract contains an arbitration clause, a presumption of arbitrability arises. The court should not decline to order arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."

Id. (Quoting *A T & T Technologies, Inc. V. Communications Workers of America*, 474 U.S. 643, 648 (1986)). "The Court has thus made it clear that, except for matters specifically excluded from arbitration in the collective bargaining agreement, all questions on which the parties disagree must be submitted to arbitration." *Id.* (Citing *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960)).

Consequently, "courts have liberally construed traditional contract law in this area because of the strong congressional policy favoring arbitrability." *United Paperworkers Int'l Union v. International Paper Co.*, 920 F.2d 852, 855 (11th Cir. 1991). "Moreover, all that is required to find the existence of a collective-bargaining agreement is conduct by the parties manifesting an intention to be bound." *Id.* "There is no independent requirement in federal law of ratification [of a collective bargaining agreement] by a union." *Kraftco*, 799 F.2d at 1111. "A collective bargaining agreement must be ratified by a union's membership only if the union's constitution, by-laws or rules and regulations create such a requirement." *Id.* Furthermore, the existence of the collective

bargaining agreement does not even depend on its "reduction to writing, it can be shown by conduct manifesting an intention to abide by the agreed-upon terms." *Bobbie Brooks*, 835 F.2d at 1168.

In *United Paperworkers Int'l Union v. International Paper Co.*, the Eleventh Circuit upheld the district court's finding that the company's unilateral implementation of its final offer, and the union's subsequent commitment to continue working and not to strike without ten day's notice to the employer, created an implied, interim contract that included an obligation to arbitrate grievances. *United Paperworkers*, 920 F.2d at 855. As the Eleventh Circuit stated:

> When the Company decided to implement unilaterally a modified version of its final offer, the Union and the Union-represented employees were still faced with the decision of whether to accept the offer of interim employment and to continue working or to strike. We have no conceptual difficulty in understanding that an employment arrangement that was unacceptable as a permanent, formal agreement might still be acceptable as a temporary, stop-gap measure.

Id. At 857. Further the Eleventh Circuit held that "[d]uring the entire period of interim employment, . . . the Union-represented employees continued to work; and

the Union never called for a work stoppage. The conduct of the Union and Union-represented employees was sufficient to manifest acceptance of the unilaterally imposed terms of employment." *Id.* At 857-58. More specifically, the Eleventh Circuit held that

> the Union here has not only claimed that the Union accepted the Company's offer of interim employment, but the Union has proffered uncontradicted evidence to buttress that claim. The uncontroverted evidence shows the Union expressly agreed that the employees it represents would continue working under the Company's unilaterally implemented offer and that the Union would not call a strike without a ten-day notice. In the circumstances of this case, when the Union agreed to give up portions of its usual arsenal of economic weapons and the Union-represented employees continued working in reliance of [sic] the terms of the Company's implemented offer, there is, as a matter of law, enough to manifest the Union's intention to be bound by the temporary agreement.

Id. at 860.

Furthermore, in *United Paperworkers*, the Eleventh Circuit also distinguished the decisions of the Tenth Circuit in *United Food & Commercial Workers Int'l Union,*

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AFL-CIO, Local 7 v. Gold Star Sausage Co., 897 F.2d 1022 (10th Cir. 1990) and *International Union, United Mine Workers of America v. Big Horn Coal Co.*, 916 F.2d 1499, 1501-02 (10th Cir. 1990) (per curiam), *cert.denied*, 502 U.S. 1095 (1992). In *Gold Star*, the Tenth Circuit rejected the Union's arguments that certain of its employee grievances were arbitrable under the terms of the employer's unilaterally implemented final offer on the grounds that the unilateral offer was not a contract between the parties. *Gold Star*, 897 F.2d at 1026. As the Eleventh Circuit noted however, "the *Gold Star* court made clear. . . that 'the Union does not even allege that the Company's last offer is, in some sense, a contract between the parties, much less point to any facts in the record that might support such an assertion.'" *United Paperworkers*, 920 F.2d at 858 (quoting *Gold Star*, 897 F.2d at 1026). Finally, the Eleventh Circuit concluded its analysis by stating:

> [T]he Tenth Circuit opinions can be cited for the proposition that such additional evidence of union acceptance does establish an interim contract created by an implemented final offer:
>
> "Employer implementation of a last and final offer is, by itself, insufficient to invoke jurisdiction absent some manifestation of acceptance of the offer sufficient to create a contract . . . . The contract between the parties required for jurisdiction need not be a written, signed collective-bargaining agreement, but may

> exist as any informal agreement between the parties significant to the maintenance of labor peace between them. It suffices that the parties' intent to abide by the agree-upon provisions of any such informal agreement is in some manner manifest."
>
> *Big Horn*, at 1501-1502 (emphasis added) (citing *Gold Star*, 897 F.2d at 1026) . . .

Id. At 858.

Furthermore, the reasoning of the Eleventh Circuit in *International Paper* is in accord with precedent in this Circuit. *See International Bhd. Of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers-Local 1603 v. Transue & Williams Corp.*, 879 F.2d 1388 (6th Cir. 1989), in which we stated:

> In the case at bar, the district court correctly found that Transue and the Union agreed to adhere to the grievance and binding arbitration provisions of the 1986 Contract. Transue accepted, processed, and responded to over fifteen grievances pursuant to the procedures established by the 1986 Contract. During this period of operations without a formal collective bargaining agreement, the Union did not strike, picket or resort to the use of any economic weapons, but

> continued to work for the new pay rates negotiated in the 1986 Contract. Thus, both the Union and Transue evidenced, by their conduct, an intent to remain bound to the grievance and arbitration provisions of the 1986 Contract. . . Moreover, both parties, especially Transue, benefitted from the resultant "industrial peace" and the common belief that there was an agreed upon dispute resolution procedure.

Transue, 879 F.2d at 1393.

However, our decision in *International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union 1199 v. Pepsi-Cola General Bottlers, Inc.*, 958 F2d 1331 (6th Cir. 1992), relied on by ABS is distinguishable from this case. In *Pepsi-Cola* the Company refused to submit the grievance of a terminated Union member to binding arbitration. The events giving rise to the grievance occurred during the hiatus period, the period between the expiration of an old collective bargaining agreement and the implementation of a new agreement. The Union sued, advancing a number of theories as support for its argument that Pepsi had a contractual duty to submit the grievance to arbitration. Among other things, the Union argued that it "entered into an implied agreement [with Pepsi] to arbitrate grievances during the period between the effective dates of the old and new collective bargaining agreements." *Id.* at 1333.

We rejected the Union's argument that the facts in *Pepsi-Cola* showed conduct manifesting an intention to abide by the terms of the alleged agreement to arbitrate differences during the hiatus period. We stated that

> [a]fter the old collective bargaining agreement expired, Pepsi terminated dues deductions even though dues deductions were not a disputed provision of the old agreement. Furthermore, [the Union] called a strike during the hiatus period which would have violated the no-strike clause of the old collective bargaining agreement. Generally, an express or implied no-strike clause is the quid pro quo for the employer's agreement to arbitrate grievances.

Id. At 1335 (citations omitted).

In this case, however, there was no strike called by the Union at any time after ABS's implementation of its "Final Proposal." Furthermore, as found by the district court there was ample evidence, as manifested by the conduct of both parties, that they intended to be bound by the provisions of the "Final Proposal," particularly the grievance arbitration provision. Not only had there been no strike, but Don Hurr, the Chairman of the Executive

Bargaining Committee of Local 856, testified that there were no plans to call a strike in the future.[3]

Moreover, not only had the Union members continued to work under the provisions of the "Final Proposal," but ABS and the Union had used the grievance arbitration procedure in other instances. As Edward Searle testified at the hearing, the Union and ABS had selected an arbitrator from AAA, as provided in the "Final Proposal," and an arbitration was scheduled the day after the hearing before the district court. In its opinion, the district court found that "[t]he record clearly supports the

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[3]On August 16, 1991, E.L. Searle, ABS's director of Human Resources sent a letter to the Union advising it that any members of the Union who engaged "in a . . .sit-down, stay-in, slow-down, or any curtailment of work, or restriction or interference with production . . . will be terminated." R. 239. Further, on January 29, 1992, the regional director of the NLRB sent a letter to the parties in this case referring to a grievance which concerned ABS's discharge of 33 employees. R. 237. In his letter, the regional director indicated that the NLRB was deferring action on the grievance because the grievance "was pending in the actual grievance procedure." R. 237. At oral argument counsel for ABS asserted that the 33 employees were terminated because they had engaged in a slow-down. There is no evidence of record which supports this assertion. However, even if the employees who were terminated had been involved in a slow-down, this would not change our conclusion. The record, or at least the scant record relating to this issue, indicates that the parties resorted to the grievance procedure to resolve the dispute referred to in the letter of January 29, 1992. Thus, in January 1992, the parties were behaving as if they had a contract, a contract which included an agreement to resolve disputes by arbitration.

conclusion that plaintiff is willing to invoke the mandatory grievance-arbitration clause of the imposed contract as both a sword and shield in dealing with its own employers (sic)." J.A. 293-94.

Furthermore, although ABS places great reliance on the Union's failure to ratify the "Final Proposal," the record shows that the Union manifested its acceptance of ABS's unilaterally imposed "Final Proposal"as an interim contract. Although the Union members failed to ratify the "Final Proposal"as a permanent collective bargaining agreement, the actions of the Union in continuing to work under the terms of the "Final Proposal" without striking as well as the actions of both parties in using the grievance arbitration procedure set forth in the "Final Proposal," manifest acceptance of the "Final Proposal." Accordingly, we conclude that in this case, the district court's findings that the actions of the Union demonstrated acceptance of ABS's "Final Proposal," namely, an implied interim contract containing an agreement to arbitrate was not clearly erroneous, and the district court properly applied the law to the facts of this case.[4]

---

[4]ABS argues that the district court's decision in this case "would destroy a union's bargaining power by permitting a unilateral invocation of arbitration to also include the unilateral imposition of a no-strike provision," thereby allowing an employer to deprive the Union of its right to strike. Brief of Appellant at 10. This argument is meritless. In a case such as this, the Union accepts the unilateral contract offered by the employer by continuing to work under the terms of the contract. Thus, the employer does not unilaterally

B.

ABS argues that the district court erred pursuant to Fed. R. Civ. P. 65(a)(2) when it consolidated the hearing on the Union's motion for a preliminary injunction with the merits of the case and granted a final order without giving notice to ABS. ABS asserts that without notice of the advancement of its case on the merits, it had no opportunity to fully prepare and present its case on the merits. Fed. R. Civ. P. 65(a)(2) provides in relevant part:

> Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.

---

impose a no-strike clause, rather the Union's forbearance of its right to strike is the consideration for the arbitration clause in the implied contract.

ABS also argues that the implied interim contract in this case is illusory and unlawful because it is for an unlimited duration. However, the implied interim contract in this case is not illusory. "A labor contract of indefinite duration or one that does not specify a time or manner of termination is terminable at the will of either party upon reasonable notice to the other party." *International Union of United Auto, Aerospace & Agric. Implement Workers of Am., U.A.W. v. Randall Div. of Textron, Inc.*, 5 F.3d 224, 229 (7th Cir. 1993) (citing *Montgomery Mailers' Union No. 127 v. Advertiser Co.*, 827 F.2d 709, 715 (11th Cir 1987) and *Communications Workers of Am. AFL-CIO v. Southwestern Bell Tel. Co.*, 713 F.2d 1118, 1123 (5th Cir. 1983)).

The Union responds, relying on our decision if *United Bhd. of Carpenters and Joiners of America, Dresden Local No. 267 v. Ohio Carpenters Health and Welfare Fund*, 926 F.2d 550 (6th Cir. 1991), that ABS had the opportunity to defend the Union's counterclaim and that ABS waived its right to further proceedings. The Union points out that the following hearing on ABS's motion for a preliminary injunction on April 28, 1993, counsel for ABS requested the opportunity to submit post hearing briefs. The district court then gave the parties one week to submit simultaneous post-hearing briefs. ABS filed its post-hearing brief on May 5, 1993, and its answer to the Union's counterclaim on May 6, 1993. In its post hearing brief, ABS requested "that a preliminary injunction be granted and further that a permanent injunction be issued based upon the record." J.A. 249. Consequently, the Union asserts that ABS indicated its satisfaction with the state of the record to the district court and waived any objections to the closing of the record. Brief of Appellee at 32.

The Union, however, misapprehends the effect of our holding in *United Brotherhood*. *United Brotherhood* does not stand for the proposition that ABS has waived its objection to the district court's failure to give notice under Fed. R. Civ. P. 65. Rather based on our decision in *United Brotherhood*, ABS cannot show any prejudice arising from the district court's failure to give notice, and, thus, the failure to give notice was harmless error.

In *United Brotherhood*, the plaintiff Union argued that the district court erred in sua sponte dismissing its

complaint without giving the Union notice of its intent to dismiss as required by this court's decision in *Tingler v. Marshall*, 716 F.2d 1109 (6th Cir. 1983). We stated:

> It is difficult to credit these claims of prejudice. [The Union] made a very effective response to the court's sua sponte motion to dismiss by filing a memorandum in opposition. The court fully considered appellant's position. On appeal, the [Union] re-argued the same issues in the same way, thereby giving rise to a very strong inference that the legal position taken in the memorandum filed with the trial court reflected the [Union's] mature position. In addition, the [Union] does not indicate what additional measures it might have taken . . . We conclude therefore that the court's proceedings . . . .resulted in no prejudice to [the Union].

United Brotherhood, 926 F.2d 558.

Similarly, in this case, ABS filed a post-hearing brief which indicated its satisfaction with the state of the record. Further in its brief on appeal, ABS has reargued the same issue in the same way relied on the same evidence. More importantly, in its brief on appeal, ABS did not indicate what additional evidence it would have presented if it had received notice from the district

court..[5] Accordingly, we conclude that ABS was not prejudiced by the district court's failure to give notice under Fed. R. Civ. P. 65. Therefore, error, if any, on the part of the district court was harmless error.

III.

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[5]However, in its reply brief, filed after the Union pointed out the effect of our decision in *United Brotherhood*, ABS claimed that had it received notice, it would have taken the depositions of other Union officials "who are more forth-right" than Don Hurr. Reply Brief of Appellant at 10. This amounts to no more than a claim that if given notice of a possible adverse decision, ABS would have engaged in a fishing expedition for favorable evidence.

ABS also points to the testimony of Roger Bernardez, a representative of the United Automobile Workers International Union, who testified at the hearing before the arbitrator. Bernardez testified that the Union did not consider itself bound by the no-strike clause in ABS' s "Final Proposal." However, Bernardez also testified that the Union had not engaged in any strike or slowdown after the imposition of the "Final Proposal." Reply Brief of Appellant, Addendum, pp. 43-44.

Contrary to ABS' s assertion, Bernardez' s testimony does not rebut the testimony of Don Hurr, and it would not alter the outcome of this case. Bernardez in fact testified that the Union had not engaged in a strike or slowdown since the imposition of the "Final Proposal," testimony which is consistent with the district court' s finding that the Union, through its conduct, manifested its intention to abide by the terms of the "Final Proposal." Furthermore, in an effort to claim that it was prejudiced by the lack of notice from the district court, ABS has resorted to citing evidence from the arbitration hearing on grievance A-8700, the very hearing which it sought to have enjoined before the district court.

For the reasons stated, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

AIRCRAFT BRAKING SYSTEMS CORPORATION,	)	CASE NO 5:93CG873
Plaintiff	)	Judge Sam H. Bell
- vs -	)	
	)	**ORDER**
UAW LOCAL 856,	)	
Defendant.	)	

Now pending before the court is a motion by plaintiff seeking an injunction against a pending arbitration proceeding. Defendant has filed a counter-claim seeking an order compelling the same arbitration. The temporary injunction sought by plaintiff was not granted because, when sought, that motion was "untimely" in that the temporary injunction was sought more than ten days prior to the scheduled arbitration. Only a preliminary injunction has sufficient duration to properly bind the parties. A hearing was held on the motion for a preliminary hearing. Based on the evidence and arguments presented at the hearing and in the briefs filed, the court now rules.

Defendant is the certified bargaining representative for plaintiff's production and maintenance employees. On August 10, 1991, the collective bargaining

agreement between the union and ABS expired. On that same date, ABS unilaterally imposed the terms of its final offer to the union.

> The Contract between U.A.W., Local 856 and Aircraft Braking Systems Corporation . . . is hereby extended and renewed for a period of three years from August 10, 1991, or the date of ratification whichever is later except as specifically amended hereinafter.
>
> . . .
>
> 3. Employees on the active payroll as of August 10, 1991, shall receive a lump sum payment of $800.
>
> 4. Employees on the active payroll on the first anniversary date of the contract shall receive a lump sum payment of $800.
>
> 5. Employees on the active payroll on the second anniversary date of the contract shall receive a lump sum payment of $800.
>
> . . .
>
> 14. All Company proposals dated June 20, 1991, and all tentative agreements will be

> incorporated into the Basic Labor Agreement . . . except as modified by the attached Company proposals.

(Complaint Exhibit A.) On September 3, 1991, defendant filed a grievance with plaintiff claiming that plaintiff violated the above-quoted, unilaterally implement contract because the Company refused to pay the bonus promised in paragraph 3. (Complaint Exhibit B.)

The Company claims that it is not required to arbitrate this grievance. The only questions now before this court are first, is there a valid arbitration clause which governs these parties and, second, does the instant grievance fall within the terms of that arbitration clause.

The contract imposed by plaintiff explicitly adopted proposals dated June, 1991. (Exhibit A, ¶14.) One of those proposals modified the arbitration procedures followed as the last step in the grievance process. The proposal changed the composition of the arbitration panel to utilize the services of the American Arbitration Association. (Exhibit E.) The proposal did not alter any substantive provisions of the prior arbitration clause and did, by only changing specified paragraphs, implicitly incorporate the prior arbitration clause. In fact, defendant's Director of Human Resources, Edward Searle, completely agreed that the prior arbitration clause, subject to modifications to use the A.A.A., was "put in place when we implemented the final offer." (T. 42-43.)

On August 16, 1991, less than a week after plaintiff unilaterally implemented its final offer, plaintiff informed

defendant that it would enforce the no-strike clause in the imposed agreement by resorting to arbitration.

> You are hereby notified that Aircraft Braking Systems' employees engaging in any actions involving a sit-down, stay-in, slow-down, or any curtailment of work, or restriction or interference with production are in direct violation of Article V of the Basic Labor Agreement. Any employees engaging in such act will be terminated in accordance with the Basic Labor Agreement.
>
> Also, in the event such incidents occur the Company will demand arbitration to determine to what relief the Company is entitled, including monetary damages.

(Trial Exhibit D.) Mr. Searle testified that the arbitration to which the letter referred was the arbitration provided for in part IV of the imposed collective bargaining agreement. (T. at 46.)

Plaintiff has participated in arbitration concerning a score of grievances as recently as April, 1993. In fact, at the same time plaintiff was claiming that there was no contractual arbitration clause, plaintiff was preparing to arbitrate the case of one Pamela Aubele. (T. at 46-48.) These arbitrations were conducted through the A.A.A.,

consistent with the June 20, 1991 proposed modifications of the collective bargaining agreement.

The case of Ms. Aubele and 32 other employees was considered by the National Labor Relations Board. The NLRB deferred consideration of the charge.

> The Union has filed grievances which encompass issues raised in the charge. **The grievances are currently pending in the contractual grievance procedure, which culminates in final and binding arbitration.**
>
> In view of these circumstances, further processing of the charge will be deferred inasmuch as the grievance-arbitration procedures of the collective-bargaining agreement are being actively pursued . . .

(Trial Ex. 15 (emphasis added)). The NLRB apparently reached this decision in January 1992 because plaintiff represented to the NLRB that the company did have an arbitration procedure in effect. (T. at 50.)

The record clearly supports the conclusion that plaintiff is willing to invoke the mandatory grievance-arbitration clause of the imposed contract as both a sword and shield in dealing with its own employers and the NLRB. When the same clause is turned against them, as in the instant case, plaintiff is unwilling to admit to the reciprocal obligation which seemingly flows from the

clause twice invoked defensively by plaintiff itself. Moreover, plaintiff waited eighteen months to raise the objection to arbitrability, assuring that defendant could not refile a charge with the NLRB. Therefore, not only has plaintiff selectively chosen to adhere to the terms of the contract which plaintiff chose to impose, it has exercised this choice in a manner, whether calculated or not, which most prejudices defendant.

The court is mindful that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 542, 548 (1964).

Plaintiff's primary argument is that no agreement to arbitrate currently exists between the parties. This court cannot agree. First, plaintiff explicitly testified through Mr. Searle that the contract imposed on the union did not contain an arbitration clause. Second, plaintiff also testified that arbitrations subsequent to August 10, 1991 were conducted pursuant to the arbitration provision as contained in the modified contract imposed on August 10. Third, plaintiff testified and documentary evidence supports the fact that plaintiff threatened arbitration against the union for violation of the terms of the imposed contract. Finally, plaintiff testified that they represented to the NLRB that a contractual grievance-arbitration process was in effect.

Quite simply, every tangible indicia of the intent of the parties shows that both sides believed and behaved according to the view that a grievance-arbitration agreement was in force between the parties. It is impossible for this court to conclude otherwise because the court is necessarily constrained by the relevant facts and applicable law.

Plaintiff's decision to unilaterally implement a contract is plainly an offer for "interim" employment. No other legal significance can be attached to the August 10, 1991 letter. By its terms, that letter sought neither ratification nor reply by the union. To the contrary, acceptance of such an offer is manifested by continuing performance. The unilateral offer contained as one of its terms an agreement to arbitrate grievances. If accepted, plaintiff can no more renege on the promise to arbitrate than it could decide to reduce wage scales or eliminate promised health benefits after work was performed.

Plaintiff's unilateral offer for interim employment was accepted. Plaintiff's cross-examination of defendant's president, Don Hurr, clearly established the fact that the union has agreed to comply with the terms of interim employment while continuing to seek a more advantageous permanent agreement. Mr. Hurr even agreed with plaintiff that the no-strike clause referenced in the August 16, 1991 letter was implemented. (T. at 66.) Most telling of all, the employees have continued to work for over 20 months under the imposed terms without violation of the no-strike clause.

Such an offer and acceptance is plainly reasonable and has been accepted by the courts. *See United Paperworkers Int'l Union v. Int'l Paper Co.*, 920 F.2d 852, 857 (11th Cir. 1991) ("We have no conceptual difficulty in understanding that an employment arrangement that was unacceptable as a permanent, formal agreement might still be acceptable as a temporary, stop-gap measure.") In *United Paperworkers*, the Eleventh Circuit held that a unilaterally implemented contract coupled with the union's commitment not to strike without ten-day notice created an interim contract including the arbitration provision.

The conduct of both parties is consistent with a finding that an interim agreement containing a grievance-arbitration clause exists. The law recognizes the binding effect of such an agreement. Plaintiff does not challenge the fact that defendant's grievance is properly a subject of the grievance-arbitration clause. Plaintiff's only remaining arguments are that delay has rendered defendant's grievance untimely and that the NLRB has twice resolved this grievance.

Plaintiff claims that defendant's grievance "languished in limbo for a year and a half [sic]." (Reply Memo at 6.) Plaintiff's claim arises from a difference of view in relation to the record. Mr. Searle testified that the grievance was timely filed in August 1991. (T. at 40.) Searle also testified about the grievance procedure followed by plaintiff. Under the procedure, many grievances remain outstanding pending submission to arbitration in the apparent hope that these grievances will ultimately be resolved without recourse to the expense of arbitration. (*See e.g.*, Exs. A, B & C.) In short, by the procedures followed by plaintiff, the instant grievance is not untimely.

Plaintiff's claim that the NLRB twice resolved the instant grievance is also based on the same type of logic. The charges filed with the NLRB relate to plaintiff's unwillingness to bargain in good faith as partially evidenced by plaintiff's unwillingness to pay the compensation promised in paragraph 3 of the August 10 letter. (Exs. 9 and 11.) In contrast, the current grievance does not concern plaintiff's statutory obligation to bargain in good faith; the current grievance concerning plaintiff's legal obligation to fulfill the promises contained in the August 10 letter. The NLRB's disposition of the charges filed before it do not resolve plaintiff's alleged breached promise.

In sum, an agreement to arbitrate does exist and the instant grievance is within the terms of that arbitration agreement. Plaintiff's motion is DENIED and defendant's motion is GRANTED. Plaintiff is hereby ordered to submit grievance A8700 to binding arbitration pursuant to the modified section IV implemented by the August 10, 1991 letter.

IT IS SO ORDERED.

SAM H. BELL
U. S. DISTRICT JUDGE

APPENDIX C

IN THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AIRCRAFT BRAKING SYSTEMS CORPORATION,	)	
APPELLANT,	)	
vs.	)	
UNITED AUTOMOBILE, AEROSPACE AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, LOCAL 856,	)	CASE NO.C.A. 3614
APPELLEE.	)	

MOTION OF APPELLANT TO REMAND THE CASE TO DISTRICT COURT

Now comes Appellant, Aircraft Braking Systems Corporation, to move the Court to remand the within matter to the District Court as the Order appealed is not a final judgment. The reasons supporting this Motion are

set forth with greater specificity in the Memorandum in Support hereof.

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IN THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AIRCRAFT BRAKING SYSTEMS CORPORATION,	)
APPELLANT,	)
vs.	)
	)CASE NO.C.A. 3614
UNITED AUTOMOBILE, AEROSPACE AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, LOCAL 856,	)
APPELLEE.	)

MEMORANDUM IN SUPPORT OF APPELLANT'S MOTION TO REMAND

On April 22, 1993, Appellant Aircraft Braking Systems Corporation, hereinafter "ABSC", filed its Complaint to Say the Arbitration of a grievance filed by the Appellee, United Automobile, Aerospace, Agricultural Implement Workers of America, UAW, Local 856, hereinafter "Local 856"). The arbitration hearing was scheduled by the American Arbitration Association before an arbitrator that had been selected by the American Arbitration Association and the UAW despite ABSC's objections to the arbitration. See Complaint, Docket 1. Pursuant to ABSC's motion, a hearing for a Preliminary Injunction was held on April 28, 1993. Docket 4. On the same day, April 28, 1993, the UAW filed its Answer to the Complaint together with a Counterclaim to Compel Arbitration. Docket 11. Then

on May 6, 1993, the UAW filed a Motion for Judgment on its Counterclaim to Compel Arbitration. Docket 15.

On May 14, 1993, the District Court entered its Order granting judgment on the UAW's counterclaim and ordering ABSC to submit the grievance to binding arbitration. The District Court's Order also denied ABSC's Motion for Preliminary Injunction, Docket 16, from which ABSC filed its Notice of Appeal to the Sixth Circuit with the Clerk of the District Court on June 3, 1993. Docket 20.

The arbitration commenced pursuant to the Trial Court's Order on May 17, 1993 and was continued to and concluded on July 13, 1993. The Arbitrator issued an Award on September 27, 1993 granting the UAW substantial relief. In the proceedings before the Arbitrator, new evidence was presented concerning the issue of whether the grievance was lawfully before the Arbitrator. The Arbitrator ruled that he had lawful jurisdiction to hear and decide the grievance.

On November 3, 1993, ABSC filed a Petition to Revoke the Arbitration Award on the grounds that the Award did not draw its essence from the terms of a collective bargaining agreement, that the Arbitrator exceeded the scope of the grievance submitted by the Union and that the Arbitrator was without lawful jurisdiction to hear and decide the grievance. The Petition to Revoke is now pending in the District Court as Case No. 93 CV 2358.

The District Court's Order denying the ABSC's Motion for Preliminary Injunction is by its very nature an interlocutory order. Whether or not a judgment on a counterclaim is a final judgment depends on the circumstances surrounding the proceeding and the

counterclaim. An essential element for a final judgment for the purpose of appeal is that the judgment must terminate the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce what has been determined. *Parr v. United States*, 351 U.S. 513, 518 (1956); *St. Louis, I.M. & S. R. Co. V. Southern Express Co.*, 108 U.S. 24, 28 (1883). It is obvious that the litigation concerning the lawfulness of the arbitration, together with the lawfulness of the Arbitration Award, has not terminated the litigation.

The UAW's counterclaim is based upon the same facts as ABSC's Complaint and neither has been fully litigated or finally adjudicated. ABSC's claim for injunctive relief was presented in a hearing for a preliminary injunction and the UAW merely presented evidence rebutting ABSC's claim for preliminary injunctive relief. The District Court's Order granting the counterclaim to compel arbitration was not a final judgment, but rather, it was in the nature of a preliminary injunction. If the UAW had filed a complaint to compel arbitration, rather than a counterclaim, the UAW would have been required to proceed through complete pretrial and trial procedures, pursuant to the Federal Rules of Civil Procedure, in order to obtain a final judgment. The only procedure available to the UAW to obtain an earlier remedy would have been pursuant to a motion and haring for a preliminary injunction, which if granted, would have been interlocutory and not a final order. As the judgment on the counterclaim is based on evidence presented at a hearing upon ABSC's Motion for Preliminary Injunction, Plaintiff's counterclaim to compel arbitration is no more final than if it had been based upon a motion by the UAW for a preliminary injunction to compel arbitration. Clearly, the District Court's Order compelling arbitration is an interlocutory order and should be remanded to the District Court for further

proceedings pursuant to Federal Rule of Civil Procedure 65.

Furthermore, the Arbitrator received new evidence at the arbitration hearing relative to the issue of the lawfulness of the Arbitrator's jurisdiction to hear and decide the grievance That evidence is contained in the Record before the District Court in ABSC's action to revoke the Arbitration Award in Case No. 2358. In order to obtain a final judgment and to terminate the dispute between the parties concerning the grievance, it is necessary to fully adjudicate both the lawfulness, or unlawfulness, of both the arbitration proceeding and the Arbitration Award. Thus it is necessary to remand the case to to [sic] the District Court where it should be consolidated with ABSC's action to revoke the Arbitration Award for further proceedings and final judgment.

Respectfully submitted,

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Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion and Memorandum in Support thereof have been served upon counsel for the Appellee, Betty Grdina, 2036 East Prospect Road, Ashtabula, OH 44004, by U.S. mail, this 7th day of January, 1994.

_____

Edward C. Kaminski

APPENDIX D

No. 93-3614

UNITED STATES COURT OF APPEAL
FOR THE SIXTH CIRCUIT

AIRCRAFT BRAKING SYSTEMS CORPORATION,	)	
Plaintiff-Appellant,	)	
vs.	)	
	)	**ORDER**
LOCAL 856, INTERNATIONAL UNION, UNITED AUTO, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS, AMERICAN ARBITRATION ASSOCIATION, INC.	)	
Defendants-Appellees	)	

BEFORE: NELSON and NORRIS, Circuit Judges; and FEIKENS, Senior District Judge.*

*The Honorable John Feikens, Senior U.S. District Judge for the Eastern District of Michigan, sitting by designation.

The plaintiff appeals an order of the district court denying its motion for a preliminary injunction and granting judgment on the defendant's counterclaim to compel arbitration of a grievance. While this appeal was pending, the matter proceeded to arbitration, and the plaintiff has filed a separate action in the district court for review of the arbitrator's decision. The plaintiff now seeks a remand of its appeal, arguing that the order from which it took its appeal was interlocutory and that there remain issues for consideration by the district court. The defendant opposes the motion, and the plaintiff has replied in support.

We first consider our jurisdiction. The court has jurisdiction in appeals from all final decisions of the district court. 28 U.S.C. §1291. The plaintiff purported to bring his action in the district court pursuant to the Federal Arbitration Act, which speaks specifically to the appealability of orders compelling arbitration at 9 U.S.C. §16. Section 16 generally provides than an appeal may not be taken from an interlocutory order compelling arbitration, but that an appeal may be taken from a final decision with respect to an arbitration. 9 U.S.C. §§ 16(a)(3), 16(b). Thus, this section preserves the general rule that a final judgment, which leaves nothing for the district court to do except execute the judgment, is appealable. *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990)

In the instant case, the district court's order compelling arbitration is final. This is not an action in which the arbitration issue was "embedded" in another proceeding. *See e.g. Perera v. Siegal Trading Co.*, 951 F.2d 780 (7th Cir. 1992). Nor does it appear from a reading of

the complaint that the district court had any issues before it other than the arbitrability of the complaint. The district court's grant of the defendant's motion for judgment on its counterclaim essentially precluded any further examination of the plaintiff's complaint. Thus we conclude, as apparently the plaintiff id when it perfected this appeal, that the district court's order is the final judgment in the case and therefore is appealable.

Turning to the plaintiff's motion to remand its appeal, we hold that it has not advanced sufficient grounds for such a remand. Thee appears to be pending in the district court a petition for review of the arbitration proceeding. Ultimately, if necessary, the plaintiff may appeal the district court's decision to this court. Given the finality of the district court's order, we conclude a remand is not appropriate at this time.

Therefore, it is **ORDERED** that the motion to remand is denied.

ENTERED BY ORDER
OF THE COURT

_____
Clerk

APPENDIX E

DOWD, J.

UNITED STATED DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Aircraft Braking Systems, Corporation,	)	
Plaintiff,	)	CASE N0. 5:94 CV 0496
vs.	)	
	)	**MEMORANDUM OPINION**
United Automobile, Aerospace & Agricultural Implement Workers of America, et al.,	)	(Disposing of Docket Nos. 6 and 14)
Defendants.	)	

On April 1, 1994, the Court conducted a hearing on plaintiff's motion for preliminary injunction (Docket Nos. 6, 17). All parties were represented and heard. In addition, the defendants' motion for judgment on the pleadings (Docket No. 14) is before the Court. As stated below, the motion for preliminary injunction (Docket No. 6) is granted in part and denied in part. The motion for judgment on the pleadings (Docket No. 14) is denied.

Plaintiff Aircraft Braking Systems Corporation ("ABSC") seeks to enjoin two separate arbitration proceedings before the American Arbitration Association ("AAA"): 1) Grievance #A8779, scheduled for a hearing on April 6, 1994; and 2) Grievance #A-8712, scheduled for a hearing on April 28, 1994. It also seeks, by separate motion, judgment on the pleadings on the grounds of *res judicata* and collateral estoppel.

Having considered the parties' opposing positions, the Court temporarily enjoins the arbitration of Grievance #A8779 (April 6, 1994), finding that the Stand Still Agreement between Local 856 and ABSC, dated January 12, 1993, remains in effect and prohibits this particular arbitration. The Court will consider lifting this injunction after the cross-motions for summary judgment filed in *UAW Local 856, et al. v. Loral Corp., et al.*, Case No. 5:92 CV 2391, are decided. The Court anticipates a ruling on these motions by no later than the end of April, 1994.

The Court will not enjoin the arbitrating of Grievance #A-8712 (April 28, 1994).

In view of the ruling on plaintiff's motion for injunctive relief, defendant's motion for judgment on the pleadings (Docket No. 14) is denied.

IT IS SO ORDERED.

_____

David D. Dowd, Jr.
U.S. District Judge

APPENDIX F

DOWD, J.

UNITED STATED DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Aircraft Braking Systems, Corporation,	)	
	)	CASE N0. 5:94 CV 0496
Plaintiff,	)	
vs.	)	
	)	**MEMORANDUM OPINION**
United Automobile, Aerospace & Agricultural Workers of America, UAW, et al.,	)	(Resolving Docket Nos. 23, 24 and 27)
Defendants.	)	

I. Introduction

Plaintiff Aircraft Braking Systems Corporation, ("ABSC"), brought this action against Defendant United Automobile, Aerospace, Agricultural Workers of America, UAW, Local 856, ("UAW"), to stay arbitration of two grievances, #A-8779 and #A-8712, alleging that there was no collective bargaining agreement, ("CBA"), between Plaintiff and Defendant compelling arbitration. Defendant counterclaimed seeking an order compelling Plaintiff to arbitrate both grievances, pursuant to the

decision of Judge Sam H. Bell in Case No. 5:93 CV 873, *aff'd ABSC v. UAW*, No. 93-3614 (6th Cir. April 21, 1995). Judge Bell held that there was a CBA between Plaintiff and Defendant which compelled arbitration of grievances. In the instant case, this Court temporarily enjoined arbitration of grievance #A-8779, pending resolution of *UAW Local 856. et al. v. Loral Corp. et al.*, Case No. 5:92 CV 2391, but did not enjoin the arbitration of grievance #A-8712. (Docket No. 26) Grievance #A-8712 then proceeded to arbitration.

Plaintiff now moves this Court for an order confirming the arbitration award, which dismissed grievance #A-8712 on the ground that there was no CBA between Plaintiff and Defendant. (Docket No. 23) Defendant moves for an order vacating the arbitration award on the grounds that the parties were barred by the doctrines of res judicata and collateral estoppel from relitigating the question of the existence of an interim agreement to arbitrate. (Docket No. 24) Defendant further moves for an award of attorney fees. (Docket No. 27)

II. Background Facts

Defendant is the exclusive collective bargaining representative for Plaintiff's hourly production and maintenance workers. (Compl. ¶7) On August 10, 1991, the CBA between Plaintiff and Defendant expired. (Compl. ¶8) On that same day, Plaintiff unilaterally imposed on Defendant the terms of Plaintiff's final proposal, stating that the proposal was thereby "extended and renewed for a period of three years from August 10, 1991, or the date of ratification whichever is later except as amended hereafter." (Searle Aff., Ex.1) This final proposal included a grievance and arbitration procedure identical in its substantive provisions to that of the

expired agreement. (Compl. ¶10) The only difference was that Plaintiff's final proposal changed the composition of the arbitration panel to utilize the services of the American Arbitration Association, ("AAA"). (Megois Aff., Ex. 10)

Less than a week after Plaintiff implemented its final proposal, Plaintiff sent a letter to Defendant's Chairman of the Executive Bargaining Committee, Donald Hurr, notifying Defendant that Plaintiff would enforce the no-strike provision of the proposal. (Megois Aff., Ex. N) Plaintiff informed Defendant that if Defendant went on strike, Plaintiff would demand arbitration, in accord with the implemented proposal, to determine what relief it was due. (Megois Aff., Ex. N)

Mr. Hurr testified that Defendant agreed that, under the proposal, Plaintiff had the right to demand arbitration. (Transcript of proceedings before Judge Bell, ("Ct. Tr."), 62) Mr. Hurr contended that Defendant recognized that the right was established on August 10, 1991, when Plaintiff implemented its final proposal. (Ct. Tr., 62) Mr. Hurr stated that when Plaintiff became entitled to arbitration, Defendant became bound at the same time to a no-strike provision. (Ct. Tr., 66) Mr. Hurr then testified that Defendant has not formally accepted Plaintiff's proposal: when put to a vote, the union members voted not to ratify it. (Ct. Tr., 70) Mr. Hurr further testified that although Defendant has not agreed to ratify the proposal, it has continued to work under those terms, including adherence to the no-strike provision. (Ct. Tr., 71)

Plaintiff has participated in the arbitration of approximately 33 labor-related grievances that Defendant filed since August 10, 1991. (Ct. Tr., 46; Searle Aff., 3) Arbitration of these grievances was not ordered by the

National Labor Relations Board ("NLRB"), but rather was entered into by Plaintiff and Defendant in accordance with the arbitration procedure in Plaintiff's final proposal. (Ct. Tr., 48-50) These arbitration proceedings have been conducted by the AAA, as provided for in Plaintiff's final proposal. (Ct. Tr., 47)

On September 13, 1991, Defendant filed another grievance with Plaintiff, claiming that Plaintiff had violated its final proposal by refusing to pay certain bonuses promised in the proposal. (Docket No. 12, Ex. Q) Plaintiff contended that it vas not required to arbitrate that particular grievance because there was no contract between the parties compelling arbitration. (Docket No. 12, Ex. Q) The matter went before Judge Sam H. Bell, Case No. 5:93 CV 873, for resolution of whether there was a valid arbitration clause governing the parties and whether the grievance fell within the terms of that arbitration clause. (Docket No. 12, Ex. Q) Judge Bell's May 14, 1993, decision held that "[t]he conduct of both parties is consistent with a finding that an interim agreement containing a grievance-arbitration clause exists." (Docket No. 12, Ex. Q) He noted that Plaintiff "is willing to invoke the mandatory grievance-arbitration clause of the imposed contract as both a sword and shield in dealing with its own employers [sic] and the NLRB. When the same clause is turned against them, as in the instant case, plaintiff is unwilling to admit to the reciprocal obligation which seemingly flows from the clause twice invoked defensively by plaintiff itself." (Docket No. 12, Ex. Q) Holding that an agreement to arbitrate did exist, Judge Bell ordered the parties to submit the grievance to binding arbitration. (Docket No. 12, Ex. Q) On April 21, 1995, the Court of Appeals for the Sixth Circuit affirmed the May 14, 1993 ruling of Judge Bell. *ABSC v. UAW*, No. 93-3614 (6th Cir. April 21, 1995).

Prior to Judge Bell's resolution of the action involving that grievance, Defendant submitted two additional grievances to Plaintiff. On September 11, 1991, Defendant submitted grievance #A-8712, claiming Plaintiff had violated the final proposal by having certain work done outside the premises. (Compl. ¶27; Countercl. ¶12) On December 11, 1991, Defendant certified the grievance to arbitration. (Countercl. ¶14) On January 10, 1992, Defendant submitted to Plaintiff grievance #A-8779, concerning Plaintiff's implementation of the "Comprehensive Medical Plan" provided for in Plaintiff's final proposal. (Compl. ¶14; Countercl. ¶9) On February 28, 1992, Defendant certified the grievance to arbitration. (Countercl. ¶9) Plaintiff refused to arbitrate both grievance #A-8712 and #A-8779, contending that they are not arbitrable and that there is no agreement to arbitrate. (Countercl. ¶18, 19)

On November 10, 1992, Defendant filed suit in this court, *UAW v. Loral Corp.*, Case No. 5:92 CV 2391, alleging that Plaintiff and Loral violated the CBA by implementing the "Comprehensive Medical Plan" provided for in Plaintiff's final proposal. (Compl. ¶17) Subsequently, on January 12, 1993, Plaintiff and Defendant entered into a written Stand Still Agreement concerning grievance #A-8779, which also concerned the medical plan. (Compl. ¶18) The agreement provided that grievance #A-8779 be held in abeyance pending final determination in Case 5:92 CV 2391. (Compl. ¶18) On January 20, 1993, the AAA also agreed to hold grievance #A-8779 in abeyance pending the outcome of the litigation in Case No. 5:92 CV2391. (Compl. ¶19)

On August 16, 1993, Defendant advised Plaintiff that it wished to revive the arbitration of grievance #A-8779, contending that the Stand Still Agreement no longer barred its arbitration because the part of Case No.

5:92 CV 2391 which concerned Plaintiff and Defendant had been
dismissed, thus lifting the Stand Still Agreement. (Compl. ¶22; Def.'s Answer, ¶20) On January 19, 1994, the AAA informed the parties that the arbitration of grievance #A-8779 would go forward on April 6, 1994. (Compl. ¶25) Then, on February 11, 1994, the AAA informed the parties that arbitration of grievance #A-8712 would go forward on April 28, 1994. (Compl. ¶30)

On March 8, 1994, after Judge Bell's decision but before the Sixth Circuit's affirmance, Plaintiff initiated this action to stay the April 1994 arbitration of both grievance #A-8779 and #A-8712 on the grounds that there was no agreement to arbitrate between the parties and because #A-8779 was barred from arbitration by the Stand Still Agreement. (Compl. ¶l) On April 4, 1994, this Court issued an Order enjoining the arbitration of grievance #A-8779 (April 6, 1994), finding that the Stand Still Agreement between Plaintiff and Defendant remained in effect and prohibited that particular arbitration. (Docket No. 21) Arbitration of grievance #A-8712, (April 28, 1994), was not enjoined. (Docket No. 21) Grievance #A-8712 proceeded to arbitration on April 28, 1994, for a decision on its merits.

Despite the May 14, 1993, decision of Judge Bell in Case No. 5:93 CV 0873 holding that there was an agreement between the parties compelling arbitration of grievances, and this Court' s April 4, 1994, Order refusing to enjoin arbitration of grievance #A-8712, Arbitrator Hyman Cohen decided the parties had no agreement to arbitrate. (Docket No. 23, Attach.) On the first day of arbitration, and at the beginning of every subsequent day of the hearings, Plaintiff's representative, Murray Portnoy, told Arbitrator Cohen that Plaintiff was there as a result of Judge Bell's decision and under protest because there

was no agreement between the parties compelling arbitration from which the arbitrator could draw his authority to resolve the dispute. (Arb. Tr., 5)
Arbitrator Cohen then stated that Mr. Portnoy had raised a threshold issue to be decided, because absent an agreement to arbitrate, the arbitrator has no authority in the matter. (Arb. Tr., 8-12) Arbitrator Cohen concluded that because Plaintiff contended there was no agreement and Defendant contended there was an agreement, the first issue he had to resolve was whether or not an agreement existed. (Arb. Tr., 16) Assuming he found existence of an agreement, Arbitrator Cohen stated that he would then decide the issue of the alleged violation prompting the grievance. (Arb. Tr.,17)

The arbitration hearing was four days long, held over the span of approximately five months. During that time, Arbitrator Cohen heard testimony. and cross-examination from the two witnesses who testified before Judge Bell in Case No. 5:93 CV 873: Edward J. Searle, Director of Human Resources for ABSC, and Donald Hurr, Chairman of the Executive Bargaining Committee for the UAW. In addition, both Plaintiff and Defendant called several witnesses who had not testified at trial.

One of Plaintiff's new witnesses, James J. Williams, vice-president of Manufacturing for Aircraft Braking Systems, gave testimony not mentioned at the trial, concerning a decline in the number of employees who worked the voluntary overtime in response to Plaintiff's implementation of the final proposal. (Arb. Tr., 459) He testified that prior to August 10, 1991, the employees met whatever overtime ABSC posted, but after August 10, 1991, the response to overtime postings was almost zero. (Arb. Tr., 461) Mr. Searle, one of Plaintiff's witnesses, testified at both the trial before Judge Bell and the arbitration hearing that the plant employees showed

their dissatisfaction with ABSC's implementation of the final proposal by yelling
"FYLO" ("forget your last offer" or "f–k your last offer") as they walked down the main aisles of the plant. (Ct. Tr., 29; Arb. Tr., 593-594) Mr. Hurr, one of Defendant's witnesses, testified at both the trial before Judge Bell and the arbitration hearing that Defendant had voted not to ratify Plaintiff s final proposal and had thus not formally agreed to the no-strike provision of the agreement. (Ct. Tr.; 70; Arb. Tr., 275) Mr. Searle testified under cross-examination at both the trial and the arbitration hearing that Defendant has not gone out on strike and has in fact continued to work under Plaintiff's final proposal. (Ct. Tr., 52; Arb. Tr., 619) Further, Mr. Searle testified at both the trial and the arbitration hearings that since August 10, 1991, Plaintiff has arbitrated approximately 33 grievances. (Ct. Tr., 47; Arb. Tr., 581)

On March 1, 1995, Arbitrator Cohen gave his decision that there was no agreement between Plaintiff and Defendant compelling arbitration. Arbitrator Cohen stated that there was no evidence that Defendant had accepted Plaintiffs offer. (Docket No. 23, Attach.) Further, he stated that merely working under the implemented offer does not establish Defendant's acceptance of the offer. (Docket No. 23, Attach.) He concluded that as the "duty to arbitrate is the quid pro quo for a no strike clause in a collective bargaining agreement, "since Defendant had not ratified the proposal it was not bound by the no-strike provision, and Plaintiff was accordingly under no duty to arbitrate the grievance. (Docket No. 23, Attach.) Arbitrator Cohen stated that the conduct of the employees in refusing to work the overtime and yelling "FYLO" showed their intent not to be bound by the proposal, and was compelling evidence that there was in fact no acceptance and no agreement. (Docket No. 23, Attach.) Arbitrator Cohen did not mention the parties'

arbitration of approximately 33 other grievances that were submitted after August 10, 1991. (Docket No. 23, Attach.) On March 9, 1995, Plaintiff filed a motion to confirm the arbitration award. (Docket No. 23) On March 22, 1995, Defendant filed a motion to vacate the arbitration award on the grounds that the parties were barred by the doctrines of res judicata and collateral estoppel from relitigating the question of the existence of an interim agreement to arbitrate. (Docket No. 24) This Court ordered the parties to file memorandums addressing the issues of res judicata and collateral estoppel *and* the scope of this Court's authority in the event Judge Bell's decision applies. (Docket No. 26) On May 10, 1995, the parties complied with this order, (Docket Nos. 27, 28, 29), and Defendant further submitted a motion for an award of attorney fees. (Docket No. 27)

III. Res Judicata and Collateral Estoppel**

A. Res Judicata and Collateral Estoppel Standard

The doctrines of res judicata and collateral estoppel state a fundamental precept of law that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies." *Montana v. United States*, 440 U.S. 147, 153 (1978) (quoting *Southern Pac. R.R. Co. v. United States*, 168 U.S. 1, 4849 (1897)). The doctrine of res

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**Although there are arguments both for and against the underlying question of the existence of a CBA, this Court finds no need to conduct an extensive review of the merits of this issue in light of Judge Bell's clear decision which already addressed the issue and has been upheld on appeal. *ABSC v. UAW*, No. 93-3614, slip op.

judicata dictates that a final judgment on the merits bars further claims based on the same cause of action. *Montana*, 440 U.S. at 153. Under the doctrine of collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first cause." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citations omitted). The Sixth Circuit has held that there are four requirements of collateral estoppel that must be met before a party's litigation of an issue is barred: "(1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding, (2) determination of the issue must have been necessary to the outcome of a prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding." *N.A.A.C.P.. Detroit Branch v. Detroit Police Officers Ass'n*, 821 F.2d 328, 330 (6th Cir. 1987). Similarly, res judicata does not apply if a party did not have a "full and fair opportunity " to litigate the claim or issue in the prior action. *The Fellowship of Christ Church v. Thorburn*, 758 F.2d 1140, 1144 (6th Cir. 1985) (citations omitted). The policy reason for this is that "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana*, 440 U.S. at 153-154.

The Sixth Circuit has noted, however, that "[n]either collateral estoppel nor res judicata is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice." *Bronson v. Board. of Educ.*,

525 F.2d 344, 349 (6th Cir. 1975) (citations omitted). "[C]hanges in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues," in order to avoid injustice. *Montana*, 440 U.S. at 159. *See also United States v. Certain Land at Irving Place and 16th Street.*, 415 F.2d 265, 269 (2d Cir. 1969) (change in yearly economic impact on lessor of lessee's exercise of option to renew lease is a change in a material fact making inapplicable collateral estoppel in subsequent litigation between same parties involving same lease and same issue); *Metcalf v. Commissioner.* 343 F.2d 66, 67-68 (lst Cir. 1965) (change in ex-wife's marital status since first judicial decision having tax ramifications for ex-husband is a change in material fact making inapplicable collateral estoppel in subsequent litigation between same parties involving same issue); *Alexander v. Commissioner,* 224 F.2d 788, 792-793 (5th Cir. 1955) (change in tax rate due to a different taxable year since first judicial decision is a change in material fact making inapplicable res judicata and collateral estoppel in subsequent litigation between same parties involving same issue).

Absent such changes in circumstances, a party may not retry "matters which were actually litigated and determined in the first proceeding.... Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel." *Commissioner v. Sunnen*, 333 U.S. 591, 591 (1947). That the particular facts of a later dispute differ is of no significance: if the legal issue is the same and involves the same parties, litigation of the subsequent dispute is barred by res judicata and collateral estoppel. *National Post Office Mail Handlers v. APUW.* 907 F.2d 190, 192 (D.C. Cir. 1990). "[A] judgment upon the merits constitutes an absolute bar to a subsequent suit upon the same cause of action in respect to every matter offered and received in evidence, or which might have been offered to sustain or defeat the

claim in controversy." *Southern Pac. R.R. Co.*, 168 U.S. at 50. Further, "a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." *Montana* 440 U.S. at 162 (citations omitted). Thus, only the changed condition of a material fact or a "change in the legal climate" will provide a basis for subsequent litigation of the same facts and issue. *Montana*, 440 U.S. at 161-162.

B. Applicable Law of Arbitration

As a general rule, the court has the authority to decide the threshold question of the arbitrability of an issue. *AT&T Technologies v. Communications Workers*, 475 U.S. 642, 649 (1985) If, however, the parties have agreed to submit to the arbitrator the question of arbitrability, then the court should give considerable deference to the arbitrator, setting aside his decision only in narrow circumstances. *First Options of Chicago Inc. v. Kaplan*, No. 94-560, 1995 U.S. LEXIS 3463, at *7 (May 22, 1995). However, "courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." *First Options, supra*, at *12 (quoting *AT&T Technologies*, 475 U.S. at 649). This is because "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *AT&T Technologies*, at 648 (citations omitted). Arbitrators therefore have the authority to decide only those disputes which the parties have agreed in advance to submit to arbitration. *AT&T Technologies, supra*, at 648-649.

The arbitrator's award will be binding on the parties and upheld by the courts as long as it draws its

essence from the collective bargaining agreement," and is not merely "his own brand
of industrial justice." *United Paperworkers Int'l Union v. Misco.* 484 U.S. 29, 36 (1987) (quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). Courts have held, however, that an arbitrator is bound by res judicata and collateral estoppel when deciding matters involving "the same parties, the same union, essentially the same issue, and interpretation of the same contract." *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 562-563 (8th Cir. 1990). *See also Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 499 (5th Cir. 1986) ("Since an arbitration award involves the entry of judgment by a court, parties should be barred from seeking relief from arbitration panels when, under the doctrine of res judicata, they would be barred from seeking relief in the courts."); *Telephone Workers Union· New Jersey Bell Tel.*, 584 F.2d 31, 33 (3d Cir. 1978) (court refused, on basis of res judicata and collateral estoppel, to confirm arbitration award that decided arbitrability of an issue contrary to previous judicial decision involving same parties, same issue and same consent decree).

C. Application of the Law to the Facts

In this case, Plaintiff argues that the arbitrator's award should be confirmed despite the fact that he decided the issue of arbitrability of the grievance differently than Judge Bell in the previous court case, No. 5:93 CV 873, involving the same parties and the same CBA. Judge Bell decided there was a CBA compelling arbitration of grievances between Plaintiff and Defendant; at the arbitration hearing, the arbitrator decided there was no such CBA between the parties. Plaintiff argues that the doctrines of res judicata and collateral estoppel do not apply here for two reasons: (1) here, the parties submitted the question of arbitrability of the grievance to

the arbitrator, and thus gave him the authority to decide the matter; and (2) the arbitration award was made based on facts that were not presented to Judge Bell.

1. The Initial Determination of Arbitrability

Plaintiff's argument that the Court must confirm the arbitration award because Plaintiff and Defendant gave the arbitrator the authority to determine the issue of arbitrability by mutually agreeing to submit the question to him is without merit based on the facts in the record. On April 4, 1994, this Court refused to enjoin arbitration of grievance #A-8712, the grievance of the instant case. Grievance #A-8712 proceeded to arbitration on April 28, 1994. At the very outset of the first day of the arbitration hearings, Arbitrator Cohen stated they were there to resolve grievance #A-8712. Plaintiff's representative, Murray Portnoy, however, stated that Plaintiff was there "under protest" because there was no CBA from which the arbitrator could draw his authority to decide the grievance. Mr. Portnoy later added that Plaintiff "holds the same position as was testified earlier, that if the union was displeased with the arbitrator's ruling they could strike to try to vacate the award" because as Plaintiff felt there was no agreement compelling Plaintiff to arbitrate, there was no no-strike provision binding Defendant. (Arb. Tr., 560-561). Defendant's representative, Robert Krunich, responded that Judge Bell had held that the parties did have a contract compelling arbitration. Mr. Krunich further stated that Defendant could prove the contract's existence to Arbitrator Cohen. Arbitrator Cohen then decided that because Mr. Portnoy had raised the threshold question of the existence of a CBA, that issue would have to be decided before proceeding to the merits of the grievance. The parties then proceeded to present the issue of the existence of a CBA to Arbitrator Cohen.

Plaintiff points to both parties' appearance at the arbitration hearings and presentation of the issue of arbitrability as an indication of their mutual submission of that issue to arbitration and their willingness to be bound by the arbitrator's decision. The law states, however, that courts should not assume that the parties have agreed to arbitrate arbitrability without "clear and unmistakable" evidence that they have done so. *First Options*, 1995 U.S. LEXIS, at *13. As the *First_Options* court held, "merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, i.e., a willingness to be effectively bound by the arbitrator' s decision on that point." *First Options, supra* at *15. There, the fact that the defendant showed up at the arbitration hearing and argued arbitrability was not "clear and unmistakable" evidence of its submission of that issue to the arbitrator. *First Options, supra* at *15. Similarly, here, the fact that Plaintiff and Defendant argued the issue of arbitrability does not indicate a submission of that issue to the arbitrator.

To the contrary, the fact that Plaintiff, through Mr. Portnoy, forcefully voiced its protest to the arbitrator deciding the dispute shows that Plaintiff did not want the arbitrator to have authority over Plaintiff at all. This is further evidenced by the fact that Mr. Portnoy stated that Plaintiff recognized that Defendant could, at the end of the arbitration, strike to try to vacate the award if unhappy with it, because the arbitration and any award did not bind Plaintiff or Defendant. In *First Options*, the court held that the defendants' forceful objections to the arbitrator deciding the dispute clearly showed they did not voluntarily submit the issue of arbitrability to the arbitrator. *First Options, supra*, at *16-18. Similarly, Plaintiff's daily statement at arbitration that it was proceeding "under protest" shows it did not voluntarily submit any issue to the arbitrator. As the *First Options*

court held that the issue of arbitrability of the dispute was subject to judicial review there because the defendants did not agree to submit the question to the arbitrator, so too is the Court here able to review Arbitrator Cohen's decision of arbitrability because the evidence shows that Plaintiff and Defendant did not agree to submit the question of arbitrability to Arbitrator Cohen.

2. The Effect of Different Facts Presented at the Arbitration Hearings

Plaintiff's argument that the doctrines of res judicata and collateral estoppel do not apply because the facts presented to Arbitrator Cohen were different from those presented to Judge Bell is without merit under established case law. Plaintiff brought the issue of the existence of a CBA before Judge Bell. Plaintiff had the opportunity to try the case before the Judge. Plaintiff chose to call only one witness, Edward J. Searle, Director of Human Resources for ABSC, to testify before the court. Defendant chose to call only one witness, Donald Hurr, Chairman of the Executive Bargaining Committee for the UAW. Both Plaintiff and Defendant had the opportunity for cross-examination and then redirect examination of the witnesses. Both parties submitted documents as evidence at the trial. At the end of the parties' presentation of the case, Judge Bell held that "every tangible indicia of the intent of the parties shows that both sides believed and behaved according to the view that a grievance-arbitration agreement was in force between the parties. It is impossible for this court to conclude otherwise...." Case No. 5:93 CV 0873, *aff'd ABSC v. UAW*, No. 93-3614 (6th Cir. April 21, 1995). Judge Bell held that Plaintiff's arbitration of approximately 33 grievances pursuant to the arbitration provision in the final offer after August 10, 1991, was conduct indicating Plaintiff's belief that a contract existed. Further, Judge

Bell held that Defendant's continued work under the terms of the final offer without a strike was conduct indicating Defendant's acceptance of Plaintiff's unilateral offer for interim employment and was, in fact, "most telling of all" that there was an interim contract between Plaintiff and Defendant.

Then, at the arbitration hearings involving grievance #A-8712, both Plaintiff and Defendant called more witnesses than they had at the trial before Judge Bell. Plaintiff s witnesses gave extensive testimony about the employees' yelling of "FYLO" and the decline in the percentage of workers who volunteered to work the mandatory overtime. Arbitrator Cohen had the same evidence of Plaintiff's arbitration of the 33 grievances and Defendant's continued work without a strike, but decided that the yelling and the decline of overtime volunteers indicated an intent not to be bound that outweighed the other evidence and showed that Defendant did not recognize a contract between Plaintiff and Defendant. Arbitrator Cohen thus concluded that because Defendant voted not to ratify the contract, Defendant did not embrace the no-strike provision and thus there was no arbitration clause binding Plaintiff to arbitrate grievances.

Plaintiff argues that this extensive evidence given by its new witnesses about the conduct of the employees is a change in material facts that make inapplicable res judicata and collateral estoppel. This argument is without merit for two reasons. In the first place, this argument fails because Plaintiff had the "full and fair opportunity" to litigate its claim, which is required for application of res judicata and collateral estoppel. *See Montana*, 440 U.S. at 153-154; *The Fellowship Christ Church, et al.*, 758 F.2d at 1144; *N.A.A.C.P. Detroit Branch. et al.*, 821 F.2d at 330;

John Morrell & Co., 913 F.2d at 564. In *John Morrell & Co.*, the court held that the
arbitrator was bound by the court's earlier decision because "[b]oth parties presented abundant evidence on the issue at trial, and both had strong incentives to litigate the issue fully. Furthermore, the jury's verdict addressed the exact issue which the arbitrator chose to reconsider." 913 F.2d at 564. Similarly, here both Plaintiff and Defendant had the opportunity to present evidence at trial and had incentives to present their case fully. Further, they each presented the same evidence at the arbitration hearings that was given at trial, albeit in more detail at the hearings. Thus, because Plaintiff had the "full and fair opportunity" to litigate the matter of the existence of a CBA, there is no injustice to refuse Plaintiff a chance to relitigate it. On the contrary, it is unfair to Defendant to subject it to the "expense and vexation attending multiple lawsuits." *Montana*, 440 U.S. at 153-154.

In *John Morrell & Co.*, because the parties had the opportunity to fully litigate the matter, the court held that there was "no really good reason for permitting it to be litigated again." 913 F.2d at 564. Similarly, here Plaintiff and Defendant had the "full and fair opportunity" to litigate the question of the existence of a CBA and so there was no reason for it to be relitigated. As the *John Morrell & Co.* court vacated the arbitrator's award because it had ignored the court decision, so too does this Court vacate Arbitrator Cohen's award because it ignored the precedent set by Judge Bell's decision.

Secondly, in view of Judge Bell's decision, the doctrines of res judicata and collateral estoppel apply with regard to the arbitrator's decision as to the existence of a CBA because Plaintiff does not show a change in material facts from the trial to the arbitration proceedings, and the

same legal issue is involved in both. The law states that only evidence of a change in material fact from the first action to the second will make inapplicable res judicata and collateral estoppel. *Montana.* 440 U.S. at 159. Here, Plaintiff does not allege that any new events have taken place since the trial before Judge Bell. Moreover, Plaintiff does not allege that the facts that Judge Bell relied on to make his decision had changed before the arbitration hearings took place. Rather, Plaintiff argues that Judge Bell's decision was reached upon an incomplete presentation of facts. Assuming for the sake of argument that this is true, it is insufficient as a matter of law to bar res judicata and collateral estoppel. As the *Montana* court held, "a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view." 440 U.S. at 162 (citations omitted). Thus, according to the principles of res judicata and collateral estoppel, Plaintiff was precluded from relitigating the facts around the issue of the existence of a CBA because Judge Bell had already decided it. Although Arbitrator Cohen took a different view of the facts, he was bound by res judicata and collateral estoppel to follow Judge Bell's decision. *See John Morrell & Co.*, 913 F.2d at 563 (where the trial and the arbitration proceeding both arose out of the same factual circumstances and involved the same parties and contract, the arbitrator was bound by principles of res judicata and collateral estoppel to follow the prior judicial decision). *See also Miller Brewing Co.*, 781 F.2d 494; *Telephone Workers Union of New Jersey, Local 827*, 584 F.2d 31. Here, as in *John Morrell & Co.*, the trial and the arbitration proceeding involved the same parties and arose out of the same situation involving the question of the existence of a CBA compelling arbitration. Thus, as the court there held the arbitrator was bound by res judicata and collateral estoppel to follow the judicial decision, here

too, was Arbitrator Cohen bound by res judicata and collateral estoppel to follow Judge Bell's decision holding there was a CBA compelling arbitration. As the court there vacated the award because the arbitrator ignored the prior judicial decision, so too is Arbitrator Cohen's award vacated here because he ignored Judge Bell's decision that there was a CBA compelling arbitration.

IV. Court's Authority to Demand to Arbitration

A. Applicable Law

An arbitrator's award is legitimate so long as it draws its essence from the CBA. *Grand Rapids Die Casting v. Local_Union No. 159, United Auto., Aerospace and Agric. Implement_Workers of Am., UAW*, 684 F.2d 413, 416 (6th Cir. 1982). "When the arbitrator's words manifest an infidelity to his obligation, courts have no choice but to refuse enforcement of the award." *Grand Rapids Die Casting, supra.* Where the arbitrator did not decide the question presented to him, it is appropriate for the court to remand "to avoid the draconian choice of penalizing either the company or the employee for what is, after all, the arbitrator's failure."*Grand Rapids Die_Casting, supra,* at 416. Under federal common law of labor, if a court vacates an arbitration award, the court has the power to remand the matter to arbitration when appropriate. *Grand_Rapids Die Casting, supra; see also Locals 2222,2320-2327._Int'l Bhd. of Elec. Workers v. New England Tel. and Tel. Co.*,628 F.2d 644, 647 (lst Cir. 1980); *United Steelworkers of Am. v. Timken Roller Bearing Co.*, 324 F.2d 738, 741 (6th Cir. 1963).

Courts generally remand a matter to the same arbitrator when the arbitrator has made an ambiguous award or when the arbitrator resolved one but not all of the issues submitted to him. *Industrial Mutual Ass'n. Inc.*

v Amalgamated Workers. Local Union No. 383, 725 F.2d 406, 412 n. 3 (6th Cir. 1984). *See also United Steelworkers Local 4839 v. New Idea Farm*, 917 F.2d 964, 970 (6th Cir. 1990) (remand to same arbitrator for clarification of ambiguous language of his damages award); *AFL-CIO v. Crown Cork & Seal Co.*, 300 F.2d 127 (3d Cir. 1962) (remand to same arbitrator for resolution of the second of the two issues submitted to him). Further, if the court vacates part of the arbitrator's award, it is appropriate to remand to the same arbitrator for final resolution of the issues because he is already familiar with all the evidence. *See Harvey Aluminum Inc. v. United Steelworkers of Am. AFL-CIO*, 263 F. Supp. 488 (C.D. Cal. 1967) (remand to same arbitrator for taking of testimony of witness arbitrator refused to hear at first hearing).

B. Application of the Law to the Facts

Here, Arbitrator Cohen's award will be vacated because it was barred by res judicata and collateral estoppel and because he did not decide the question presented to him, but rather decided the threshold question of arbitrability, which had already been decided by Judge Bell. *See Grand Rapids Die Casting*, 684 F.2d at 41. The law does not require that the case be remanded to Arbitrator Cohen because this is not a situation where the court is asking for a clarification of the award nor is this a situation where the arbitrator decided some but not all of the issues presented to him. *See generally Industrial Mutual Ass'n, Inc.*, 725 F.2d at 412 n.3. Rather, this is a situation where Arbitrator Cohen did not decide the merits of the dispute that the parties submitted to him, i.e. grievance #A-8712. He did not hear any evidence pertaining to that issue, and thus there is no efficiency argument for remanding to him, as there is when the arbitrator has heard all the evidence. Further, the Sixth Circuit has remanded disputes to a different arbitrator in

situations where the first one had not decided the question presented to him and the Court felt that the arbitrator had indicated his feelings on the merits of the case. *Grand Rapids Die Casting*, 684 F.2d at 416-417. Here, the Court finds that by choosing to decide the threshold issue of arbitrability rather than the issue the parties submitted to him, and by ignoring Judge Bell's decision on that very issue, Arbitrator Cohen has indicated his feelings on the issue. Therefore, the Court holds that, in the interest of fairness to all parties, grievance #A-8712 is remanded to arbitration by a different arbitrator with the AAA.

V. Award of Attorneys Fees

A. Applicable Law

It is true that §301 of the Labor Management Relations Act contains no provision for the award of attorney fees to the prevailing party. See *Monroe Auto Equip. Co. v. International Union, United Automotive, Aerospace and Agric, Implement Workers of Am. (UAW), Monroe Auto Equip. Co., Unit of Local 878*, 981 F.2d 261, 270 (6th Cir. 1992); *Knollwood Cemetery Ass'n v. United Steelworkers of Am., AFL-CIO*, 789 F.2d 367, 369 (6th Cir. 1986). However, the above cited cases explain that the general American rule of no fee-shifting would still award a party attorney fees if the other party pursued or defended its lawsuit in bad faith or without justification. As the *Monroe* court explained:

> This court in *Ray A. Scharer and Co. v. Plabell Rubber Products*, 858 F.2d 317, 320 (6th Cir. 1988) explained that exception by stating that the "normal [American] rule does not apply, however, where a party or counsel have acted in bad faith in the

> instigation or conduct of litigation, and in those circumstances, the court has the inherent authority to assess an award of attorney fees against either the litigant or his attorney." (citations omitted). The court went on to say that "[a]n award of attorney's fees...is an extreme sanction, and must be limited to truly egregious cases of misconduct." (citations omitted).

981 F.2d at 270. There are three categories of bad faith: "(1) bad faith occurring during the course of the litigation; (2) bad faith in bringing an action or in causing an action to be brought; and (3) bad faith in the acts giving rise to the substantive claim." *Shimman v. International Union of Operating Eng'rs. Local 18*, 744 F.2d 1226, 1230 (6th Cir. 1984). The Sixth Circuit does not allow an award of attorney fees based solely on the third category involving the underlying claim. *Shimman, supra*, at 1233. However, courts have "consistently recognized attorney fees as awardable where a meritless claim or defense is maintained in bad faith." *Shimman, supra*, at 1230. Finally, while the court may impose "a reasonable attorney's fee" on finding bad faith, the Sixth Circuit has held that "'a reasonable attorney's fee' does not necessarily mean actual legal expenses incurred." *Jackson v. Law Firm of O'Hara, Ruberg, Osborne and Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989)***

B. Application of the Law to the Facts

Plaintiff's-actions in bringing this suit constitute a truly egregious case of misconduct. In the original 1993 proceedings, Defendant sought an award of attorney fees from Judge Bell who deferred the issue to Magistrate Judge Gallas. On March 31, 1994, the Magistrate Judge issued a report and recommendation finding in favor of

Defendant on this issue. (Docket No. 27, Ex. A) The Magistrate Judge held that:

> Clearly, [ABSC's] position that there was no agreement to arbitrate was completely untenable and unjustified. There was bad faith in bringing this action.
>
> . . . [ABSC] attempted to prevent this arbitration with no legal or factual basis for its complaint. There was bad faith and the fact that Judge Bell gave this case priority so that arbitration was not delayed does not excuse [ABSC].

(Docket No. 27, Ex. A at 5-6)

Even after this recommendation, Plaintiff opposed arbitration of the grievance involved in the instant case, maintaining there was no agreement to arbitrate. Plaintiff then unilaterally submitted the issue of arbitrability to the arbitrator, in an attempt to attain a better result after having lost two court proceedings on the same issue and after having been found to have acted in bad faith by Magistrate Judge Gallas. In maintaining there was no CBA compelling arbitration, Plaintiff violated both this Court's refusal to enjoin arbitration of grievance #A-8712 and Judge Bell's original decision holding there was an interim agreement to arbitrate, which has since been affirmed by the Sixth Circuit Court of Appeals. *ABSC v. UAW*, No. 93-3614, slip op. When the arbitrator decided there was no agreement to arbitrate, Plaintiff sought this Court's confirmation of the arbitration proceeding to which Plaintiff had protested every day of the hearing.

Defendant is entitled to an award of attorney fees to sanction Plaintiff for its wilful refusal to abide by the

judicial process. The law states that a party may be awarded attorney fees if the other party has brought a meritless claim in bad faith. *See Shimman*,744 F.2d at 1230. Here, in spite of the previous decision by Judge Bell holding there was an agreement to arbitrate, the Sixth Circuit's subsequent affirmation of that decision and this Court's refusal to enjoin arbitration of the grievance, Plaintiff submitted to the arbitrator the issue of the existence of an agreement to arbitrate the grievance. This position of Plaintiff's that there is no agreement is unjustified, and its continued litigation against the existence of such an agreement is in bad faith. The Court therefore grants Defendant's motion for award of attorney fees. (Docket No. 27)

The Court further orders that by June 30, 1995, Defendant shall submit to this Court a well-verified and well-documented fee petition. Defendant shall, in writing its petition, consider the Sixth Circuit's holding in *Jackson v. Law Firm of O'Hara, Ruberg, Osborne and Taylor*, 875 F.2d 1224 (1989).*** Thereafter, Plaintiff shall file any opposition to the petition by July 14, 1995.**** No reply shall be permitted unless subsequently-ordered by this Court.

VI. Conclusion

***In *Jackson*, the Sixth Circuit held that "'a reasonable attorney's fee' does not necessarily mean actual legal expenses incurred." 875 F.2d at 1229.

****Plaintiff is reminded that its opposition shall be only to the categories of fees and costs and to the precise amounts, not to the issue (already herein decided) of whether fees and costs are appropriate.

In light of the foregoing, the Court holds that because of Judge Bell's May 14, 1993, decision that there was a CBA between Plaintiff and Defendant, the doctrines of res judicata and collateral estoppel apply and bar the parties from further litigating the issue of the existence of an agreement compelling arbitration of grievances. Arbitrator Cohen's award will be vacated because it addressed this threshold question and ignored Judge Bell's decision on the matter, rather than resolving the merits of grievance #A-8712, which was the issue submitted to arbitration. The Court further orders that grievance #A-8712 be remanded to the AAA to a new arbitrator for a decision on its merits, because Arbitrator Cohen has already indicated his probable decision. Finally, because of Plaintiff's bad faith in continuing litigation against the existence of a CBA despite Judge Bell's decision that such an agreement exists and despite this Court's refusal to enjoin arbitration of grievance #A-8712, the Court orders that Defendant be awarded attorney fees.

Plaintiff's motion (Docket No. 23) for confirmation of the arbitration award is hereby denied. Judgment accordingly.

Defendant's motion (Docket No. 24) for vacation of the arbitration award is hereby granted. Judgment accordingly.

Defendant's motion (Docket No. 27) for award of attorney fees is hereby granted, subject only to a determination as to the amount.*****

*****Following briefing, the Court will set the amount. At that time a separate Judgment will be entered relating solely to attorney fees.

IT IS SO ORDERED.

David D. Dowd, Jr.
U.S. District Judge

DOWD, J.

UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Aircraft Braking Systems, Corporation,	)	
	)	CASE NO. 5:94
Plaintiff,	)	
vs.	)	
	)	**JUDGMENT ENTRY**
United Automobile, Aerospace & Agricultural Workers of America, UAW, et al.,	)	
Defendant	)	

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the motion of Plaintiff Aircraft Braking Systems Corporation for confirmation of the arbitration award (Docket No. 23) is denied. The motion of Defendant United Automobile, Aerospace & Agricultural Workers of America, UAW for vacation of the arbitration award (Docket No. 24) is granted. The Court orders that grievance #A-8712 is remanded to a new arbitrator for a decision on the merits. Case Closed.

IT IS SO ORDERED.

David D. Dowd, Jr.
U.S. District Judge

APPENDIX G

AMERICAN ARBITRATION ASSOCIATION

———————x

In the Matter of the Arbitration

ARBITRATOR'S OPINION

-between-

AIRCRAFT BRAKING SYSTEMS CORP.

GRIEVANCE: ARBITRABILITY -SUBCONTRACTING AAA 53 300 00600 93

-and-

INTERNATIONAL UNION OF UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 856

———————x

FOR THE COMPANY:

MURRAY W. PORTNOY
Labor Relations Consultant
Portnoy Messinger Pearl & Associates, Inc.
7001 Brush Hollow Road
Westbury, New York 11590

FOR THE UNION:	BOB KRUNICH Chairman, Executive Bargaining Committee UAW, Local 856 1155 George Washington Blvd. Akron, Ohio 44312
DATES OF THE HEARING:	April 28, July 27, July 28 and September 20, 1994
PLACE OF THE HEARING:	Holiday Inn, Arlington Road, Akron, Ohio 4/28/95 AAA Middleburg Heights, Ohio 7/27, 28, 1995 Hilton Inn, Fairlawn, Ohio 7/20/95
ARBITRATOR:	HYMAN COHEN, Esq. Impartial Arbitrator Office and P. O. Address P. O. Box 22360 Cleveland, Ohio 44122 Telephone: 216-442-9295

* * * * *

The hearing was held on April 28, July 27, July 28 and September 20, 1994 before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties pursuant to the Rules and Regulations of the American Arbitration Association.

Post-hearing briefs were submitted on November 18, 1994.

* * * * *

Over the course of many years, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and its Local No. 856, U.A.W., the "Union" and AIRCRAFT BRAKING SYSTEM, the "Company", and its predecessors, have been parties to a series of successive collective bargaining agreements. On or about September 11, 1991 , the Union filed a grievance with the Company in which it protested the Company's violation of the Recognition and Subcontracting clauses of the "August 10, 1991 implemented Contract" and "past practice".

The parties entered into a Labor Agreement, effective October 31, 1988 which was to remain in force until 6:00 p.m., August 10, 1991. Under Article XIV, Section 1 of the Agreement, its terms may continue "for additional periods of one (1) year thereafter, with the provision that should either party desire to terminate the Agreement * * *", notification is to be given to "the other party in writing not less than sixty (60) days prior to the expiration date or the end of any subsequent yearly period * *."

Pursuant to Article XIV, Section 1 of the 1988 Agreement, the parties sent termination notices to each other in late May and early June, 1991. In June, 1991, the parties commenced negotiations for the purpose of entering into a new Labor Agreement.

Negotiations between the parties continued during July, 1991, without an agreement by the parties. At a collective bargaining meeting that was held on August 10, 1991, the Company submitted its "final proposal on all economic and noneconomic issues". It is undisputed that the Union acknowledged receiving the Company's final proposal on August 10, 1991, after which the meeting

ended. As it indicated in its final proposal, the Company implemented its "terms and conditions", effective 6:01 p.m. on August 10, 1991.

Before the Company implemented its final offer, it rejected the Union's request for a day to day extension of the previous Labor Agreement. As Director, Human Resources Edward Searle indicated, " * * we did not believe there was any value in agreeing to a day-to-day extension. We had presented our best and final offer, and we would "proceed to implement our best and final offer".

The Company's "Final Proposal On All Economic and Non-Economic Issues", in relevant part, provides:

> "Effective 6:01 PM August 10, 1991 the following terms and conditions shall be implemented:
>
> The Contract between U.A.W, Local #856 and Aircraft Braking Systems Corporation which by its terms expires at 6:00 PM August 10, 1991, is hereby extended and renewed for a period of three years from August 10, 1991, or the date of ratification whichever is later except as specifically amended hereafter. * *"

The Final Proposal contained fourteen (14) provisions. The last provision contained the following terms:

> "All Company proposals dated June 20, 1991, and all tentative agreements will be incorporated into the Basic Labor Agreement; Pension, Insurance and Service

> Award Agreement; and Supplemental Unemployment Benefit Agreement and addendum letters as appropriate, except as modified by the attached Company proposals."

The evidentiary record establishes that the bargaining unit employees were- dissatisfied about the Company's final offer. When the employees came to work the week after August 10, 1991, "there was a lot of screaming, yelling by the employees".

The employees wore shirts setting forth the letters "FYLO". The evidence indicates that the acronym means either "Forget Your Last Offer" or "F–k Your Last Offer". The acronym was also painted on different machines and walls of the plant.

The word "solidarity" was printed on the shirts worn by many employees. The employees also brought into the plant hand clickers that made "different types of noise".

Employees were offered the opportunity to work 16 hours or "doubles". Less then ten (10) employees accepted the offer by the Company. Of the ten (10) employees Williams indicated "maybe three (3) or four (4) employees worked a double shift".

Before August 10, 1991, in situations involving an "emergency", 25 or 30% of roughly more than 600 employees would show up and work on Saturday and Sunday. With respect to "posted overtime", before August 10, 1991 approximately the same number of employees that would work weekends would show up for the posted overtime. After August 10, less than ten (10) employees accepted overtime.

Vice President of Manufacturing, Williams indicated that "around the third or fourth weekend of August, 1991" the Company "declared an emergency * *". The Company "called the Union on Saturday morning" and indicated that there were not enough people to keep the machines running * *." As a result, salaried employees were assigned to work in the machine shop.

Williams indicated that software programs "were taken and thrown in the trash". What remained was "the tooling". This meant that "a programmer" would have to "come in, restructure and reset up the program, which * * could be anywhere from eight (8) hours to a couple of days, depending on the type of operation".

Williams described the activities of the employees after August 10 as a "slowdown". According to Williams, after August 10 management began "looking at individuals throughout the shop" and their work "performance".

When management saw "repeated efforts of deliberate slowdown" some of the employees were suspended, and in some cases, employees were discharged. After suspending some employees, Williams said, the Union issued a letter, which he had seen that in effect, stated: "We want you to go to work and stay at your job assignment and continue to perform your job". Approximately thirty-three (33) employees were suspended or discharged for "participating in a slowdown and disruptive behavior".

The Company presented undisputed testimony on the decline in efficiency between April, May and June, 1991 as compared to the weeks between August 10 and August 31, 1991. Between April through June, 1991, on the average, efficiency for the shop was 76%. From

August 10 until the end of the month, efficiency declined to below 63%.

It should be noted that the term "efficiency" was explained at the hearing by Manager of Industrial Engineering Thomas Strauch, as representing "direct labor which is the labor or workers actually working on the [Company's] product in the shop against the standards that have been created by the Industrial Engineering Department".

The drop in efficiency, according to Strauch cost the Company approximately $300,000 a week. Strauch provided testimony on how he arrived at this cost. He indicated that employees had been working on the average 9,940 direct hours a week in the shop. Because of the drop in efficiency from a 78% average for the year to the 63% level, the Company was required to spend an extra 2,367 hours a week in order to accomplish its workload objectives.

Strauch indicated that it costs the Company about $125 an hour to run the shop. This hourly figure includes not only direct labor but other elements of manufacturing support. As a result, the extra 2,367 hours a week "translates into $295,000 a week". Thus for the three (3) weeks in August, 1991 that efficiency was down, it cost the Company approximately $300,000 a week or close to "a million dollars".

In light of these circumstances, I turn to consider the events leading up to the subcontracting or "outsourcing" of "cups" by the Company, which prompted the Union to file the instant grievance. The nature of the cup which was a "major product line" of the Company before August 10, 1991 was described by Director of Materials Scott A. Shannon:

> " * * The cup is a metal object that can range from 2 to 3 inches in diameter. The cup's basic purpose is to hold a metallic material which is called a sintering material. It holds the sintering material, which makes a lining. The lining is then produced and riveted onto a steel disc, which is then assembled into an aircraft brake. That cup holds the metallic materials to aid in the stopping of a brakes, to act as a friction material" * *.

When a manufacturer designs the aircraft, the Company produces the only qualified equipment that the airlines are permitted to place in their aircraft. If the product, namely, the cup is not available for the aircraft, the aircraft is grounded. The Company "certifies that aircraft can fly anywhere from 300, 400 landings" before a lining, which contains the cup, is required to be changed.

It should be noted that the Company does not manufacture the "entire friction apparatus" for the brakes. The Company produces the cup. Raw material is purchased from an outside supplier which is put in a press and formed. Cups are then delivered to a sintering supplier who puts friction material inside the cups and returns the cups to the Company.

According to Williams, in light of the events which occurred at the Company's facilities during the week that followed the August 10, 1991 implementation by the Company its final offer, he recommended to Director, Human Resources, Edward Searle that the cups should be outsourced. As Williams testified:

> "After going through this for about a week, not having what I consider any indicator that this thing was going to be short-lived, we started looking at what do we do, how do we make sure we're in a position to deliver product to our customers.
>
> We looked at the press room, we looked at our machine shop, all of our processes internal. We looked at what can we do, how can we perform, what's your efficiency today, what's the output? We looked at specific operations that we thought, based on the aspect of process in-house and outside and the type of commitment that we had, that for these particular part numbers I made a recommendation to Ed [Searle] * * – that we talk to the union about outsourcing the parts."

On August 19, 1991, Searle sent a letter to Chairman, Executive Bargaining Committee D. G. Hurr, in which he indicated that the Company will be outsourcing work in order "to meet customer obligations".

Director of Material, Scott A. Shannon was assigned to find a supplier that would have the capacity and capability to produce the cup. According to Shannon, a supplier was found which could manufacture the cup. The supplier was Logan Metal Stamping which is owned by the Hawk Group. The Hawk Group also owns the Company's sintering supplier, Friction Products.

According to Shannon, Logan Metal's "concern" was that if "it was only going to be a short term proposition", it would not enter into a contract with the

Company. Their "concern" was due to the costs which would be incurred because of modifications to the dies and some of the "tools-in-house". If there was a long term commitment by the Company, Logan Metals agreed to absorb the costs for the modification of the tools. Accordingly, the Company entered into an agreement with Logan metals for three (3) years.

In its catalogue, the Company commits itself to make deliveries of the cups to aircraft in 30 or 60 days. Toni Pastors, who was the Company's buyer in August, 1991, described the "lining cups" as "a large, high volume" product which generates "a lot of dollars".

Pastor indicated that the three (3) year agreement was entered into with Logan Metal because the Company was "kind of over the barrel". The Company, she said needed an all out effort to have the dies up and running as soon as possible * *." Pastor added that "it was an enormous effort on their [Logan Metal] part or they wouldn't agree to do the work".

The three (3) year agreement with Logan Metal expired in September, 1994, according to Pastor. Pastor said that there was never a signed agreement with Logan Metal. Shannon indicated that the three (3) year agreement was based upon a purchase order with Logan Metal. As Shannon indicated, " To me, a purchase order is a contract".

On August 10, 1991, roughly 650 to 700 bargaining unit employees were employed by the Company. As of the date of the hearing in July, 1994 there were less than 400 bargaining unit employees working for the Company.

Before August 10, 1991 the Company sold about 200,000 cups a month to various airlines. At the time of

the arbitration hearing, the monthly sales of cups had decreased to approximately 60,000 cups a month.

It should be noted that the Press Operators in the Press Room had performed the work that was required on the cups. Williams indicated that "there was no layoffs in the Press Room pertaining to the cups". It is undisputed, however, that seven (7) Press Operators were laid off, effective October 4, 1991 (two (2) Press Operators) and January 10, 1992 (five (5) Press Operators).

Williams indicated that the "slowdown" by the employees ended "around the middle of September, 1991". In Searle's opinion productivity and working overtime returned to normal "sometime in late 1991, October, November, 1991". In December, 1991, the Company offered those employees who were suspended and terminated to be reinstated effective January 1992.

Since outsourcing the cups on or about September 9, 1991, the Company has not manufactured the product. The evidentiary record indicates that in order to manufacture the cups, the Company would be required to modify the dies to fit the presses of the Company. In order to manufacture the cups, the Company would incur the "associated costs of packaging" and the "carrying costs of inventory".

Moreover, the Company does not possess the technology to perform the packaging. Other related savings from not manufacturing the cups include the costs of procuring steel and the inspection of steel. Shannon estimated that the Company would have to incur costs of $50,000 to $75,000 to begin manufacturing the cups.

DISCUSSION
I
ARBITRABILITY

The Company raises a threshold issue which must be resolved before any consideration can be given to the merits of the instant dispute. The Company contends that it has no duty to arbitrate the instant grievance because there is no agreement to do so.

The grievance that was filed by the Union protests the Company's violation of the subcontracting terms under Article X, Section 12 of the Company's final offer, which provides as follows:

> "***Section 12. Subcontracting
>
> The Company and the Union agree in the principle of maintaining as much work in its Akron facilities as practical.
>
> (a) The Company agrees to notify the Union 30 days in advance of any work to be subcontracted that has not been subcontracted in the past.
>
> (b) The Company will retain the right to continue subcontracting so long as it does not do so for the purpose of abolishing jobs;

> (c) or for the purpose of abolishing work customarily or normally performed by the employees * *."

The Company's final offer also contains a grievance procedure which culminates in arbitration and a no-strike or lockout clause.

I.
IMPLEMENTATION BY COMPANY OF ITS FINAL OFFER

Before enumerating the fourteen (14) provisions or amendments, the Company's final offer provides as follows:

> "Effective 6:01 PM August 10, 1991 the following terms and conditions shall be implemented:

The Contract between U.A.W, Local #856 and Aircraft Braking Systems Corporation which by its terms expires at 6:00 PM August 10, 1991, is hereby extended and renewed for a period of three years from August 10, 1991, or the date of ratification whichever is later except as specifically amended hereafter. * *"

The Union contends that under these terms an "implied or "interim agreement" exists between the parties until the Union membership ratifies the contract between the parties. Since the Union had not ratified the contract by September 20, 1994, the last day of the hearing, the Union claims that so long as the bargaining unit employees perform their job duties, they do so under an 'implied" or "interim agreement". Thus the

"agreement" is indefinite until ratification. I disagree with the Union's interpretation of the phrase in question.

It should be underscored that the Company's final offer came into existence after several undisputed events occurred. The parties began negotiations roughly in mid-June, 1991. They were unable to reach an agreement. As a result of an impasse in negotiations, the Company implemented its final offer at 6:01 p.m. on August 10, 1991. It is undisputed that the 1988 contract expired at 6:00 p.m. on August 10. Moreover, the Company implemented its final offer after rejecting the Union's request for a day to day extension of the 1988 contract.

In light of these circumstances the intent and meaning of the language is clear. The initial terms of the final offer are self-explanatory: "Effective 6:01 p.m., August 10, 1991 the following terms and conditions shall be implemented". It must be emphasized that this statement constitutes a unilateral declaration by the Company with respect to the implementation of the terms and conditions of its final proposal.

The Company's final offer goes on to indicate that as provided in the contract between the parties, that is to say, the 1988 contract which expired at 6:00 p.m., August 10, 1991, it is "hereby extended and renewed for a period of three (3) years from August 10, 1991, or the date of ratification whichever is later * *". Again, these terms constitute a unilateral declaration by the Company. Since the Union has not ratified the Company's final offer, its terms and conditions as well as the fourteen (14) amendments are extended and renewed. Had the Union ratified the Company's final offer, the terms and conditions of the final offer would have been extended and renewed from the date of ratification, rather from

August 10, 1991 since by necessity the date of ratification would have been later than August 10.

The Union reads the phrase to mean that until its membership ratifies the terms and conditions, which it had not done by September 20, 1994, its bargaining unit employees have been working under an "implied" or "interim agreement". If such an "implied or "interim agreement" existed, there would be no reason to require the Company's final offer to be ratified by the Union membership.

There is no basis in the record to conclude that the terms of the preamble [the initial paragraph] in the Company's final offer constitute an "implied" or "interim agreement" which continues indefinitely until the Union ratifies- the final offer. The terms of the preamble is the Company's unilateral declaration that it was implementing the terms of its final offer which was extended and renewed for three (3) years from August 10, 1991 or the date of ratification, whichever [was] later". The initial statement of the Company's final offer does not constitute an "implied" or "interim agreement".

> It was precisely because the parties were unable to reach an agreement that the Company implemented its final proposal. Since the Union has claimed that there was an "implied" or "interim agreement" it would be useful to consider the nature of an agreement or a contract.
>
> Under familiar principles of contract law, a contract arises from offer and acceptance. It is undisputed that the Company implemented its final offer on August 10, 1991.

In order to establish an "implied" or "interim agreement" the Union must establish that it accepted the Company's final offer. It must do so because the Union seeks to arbitrate a grievance in which it protests the Company's violation of the subcontracting clause which is contained in Article X, Section 12 of the Company's final offer.

It is well established that arbitration is a creature of contract. The Company is not compelled to submit a dispute to arbitration if it has not previously agreed to do so. As the Supreme Court observed in *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

" * * * just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it all". At page 547.

Accordingly, by proving that it accepted the Company's final offer, the Union would also establish the existence of a contractual duty by the Company to arbitrate the instant dispute. The Union did not sign the Company's final offer. Nor, was the Company's final offer submitted to the Union membership for a vote on ratification. Clearly, there is nothing in the Company's final offer which establishes that the Union accepted the final's offer.

In *Westwood Products, Inc.* 77 LA 396 (Peterschmidt, 981) the Arbitrator put it this way: "Thus when the Union asserts that the Employer has a contractual duty to arbitrate, it must prove the assertion", at page 397. By asserting that an "implied" or "interim agreement" exists does not make it so. Having concluded that the preamble, in and of itself does not establish an "implied" or interim agreement, I turn to consider the additional arguments and evidence submitted by the Union with respect to the issue of arbitrability.

a. EMPLOYEES CONTINUED TO WORK FOR COMPANY AFTER 6:01 P.M. ON AUGUST 10, 1991, AND DID NOT GO OUT ON STRIKE

Before proceeding to consider the Union's claim that the employees continued to work under the Company's offer and did not strike, a brief summary of the principles of national labor law would be instructive. After the parties have bargained in good faith and reached an impasse, the principles of federal labor law are clear on the actions that may be taken by the parties. Both the Company and the Union may resort to the use of economic power. The Arbitrator in *Sycon Corp.*, 87 LA 206 (Abrams, 1986) stated: "As long as the parties fulfill their legal obligation to bargain in good faith they are free under national labor law to exercise their economic power in an attempt to win concessions from the other side". At page 208. In *H.K.. Porter v.*

NLRB, 397 US 99 (1970), the Supreme Court stated:

" * * But the Act (National Labor Relations Act) as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, nor that strikes and lockouts will never result from bargaining to impasse. It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining."

In light of these considerations, I turn to consider the testimony of the Union's witnesses, who claimed that an "agreement" or "contract" has existed with the Company since August 10, 1991. Greg Megois, an Inspector, who is on the Union's Executive Bargaining Committee said that as long as the employees work under the "interim agreement", the Union is not free to strike. It is true that since August 10, 1991, the bargaining unit employees have continued to work for the Company.

Working, in and of itself under the Company's final offer does not establish that there is an "agreement" between the parties. In *Westwood Products*, a similar claim was asserted by the Union, namely, that working under the terms of the Company's implemented offer requires the Company to arbitrate a dispute, as provided by the

offer. The Arbitrator in *Westwood Products* rejected the Union's claim and stated:

> "Basically the Arbitrator accepts the position of the Employer in that since no collective bargaining agreement exists between the parties, no obligation to arbitrate grievances exists. The prior contract had expired; the obligation to arbitrate disputes expired with it. The Union specifically rejected the Company's final offer and while employees continued to work for wages listed in that offer, the working arrangement constituted a new agreement only insofar as the Employer offered.
>
> Contracts arise from offer and acceptance. That is fundamental contract law. When an offer is rejected, that action cancels the offer completely. Thus the Union has no rights under the rejected offer itself–only the rights proffered by the Employer in the manner the Employer chooses * *." At page 399

These observations by the Arbitrator in *Westwood Products* are applicable to the instant case. While employees continued to work after 6:01 p.m. on August 10, 1991, they did so under the Company's implemented final proposal. The employees worked under the Company's terms and conditions. These terms and conditions serve the purpose of work rules which are unilaterally adopted and implemented by the Company. Thus working under the Company' s final offer does not constitute acceptance of the Company's final offer.

Moreover, Megois' statement that as long as the employees work under the Company's implemented offer which he characterized as an "implied agreement", the Union was not free to strike. If there is a fundamental principle in the area of labor relations, it is that employees cannot strike while they also work for an employer. A strike, simply, is a concerted cessation of work. Accordingly, while the employees worked under the Company's implemented final offer, there was no strike. However, working under the implemented final offer does not constitute acceptance of the Company's offer.

Jack Eldreth, a bargaining unit member said that the Company's final offer was an "imposed contract". This phrase contains mutually repugnant terms. A contract is based upon the mutual consent of both parties. There is no evidence that the Union consented to the Company's final offer. As I have already stated, to merely work under the Company's final offer does not constitute an acceptance of the offer.

Eldreth acknowledged that he remembered that the employees "were mad because the Company stopped negotiating and imposed its own terms and conditions without an agreement". Moreover, the following cross-examination of Eldreth is illuminating in establishing that the Union did not accept the Company's final offer.

> "* * Q. Did they give you a copy of any collective bargaining agreement between the company and the union?
>
> A. An agreement?
>
> Q. An agreement, contract.

A. I don't think I have it. I may have it in my desk. I might have it with me.

Q. Did they give it to you today?

A. No, no.

Q. Did the union say to you, "We have a contract with the company, signed contract"?

A. I haven't seen it.

Q. Have you ever seen a signed contract?

A. No, sir, I have not.

Q. After August 10th, did you ever go to the meeting to ratify a contract?

A. We went to one down on Massillon Road or Arlington.

* * * *

Q. You had a ratification meeting?

A. Yes, around that date.

Q. Did you ratify a contract?

A. No, we did not.

Q. Did you vote on it?

A. No.

Q. Didn't even vote on it?

A. No, sir.

Q. Did the union bring you a contract to vote on at all?

A. (No audible response.)

Q. If they did, you didn't see it.

Is it your opinion that there is a collective bargaining agreement that exists between the local and the company?

A. Is there a contract, an imposed contract?

Q. Imposed contract.

A. Yes.

Q. Do you know if the union ever agreed to that contract?

A. Did they sign to agree to it?

Q. Did they sign off of it?

A. Sign off to agree to it, no. * *"

Don Hurr, Chairman of the Union's Executive Bargaining Committee, was present at the August 10, 1991 meeting when the Company's final offer was implemented. The following exchange on cross-examination between the Company's representative and Hurr is of great weight.

"Q. When that meeting ended, did it end in reaching an agreement? Did we reach an agreement at the end of that meeting on August 10th?

A. Did you reach an agreement?

Q. Yes.

A. No, you imposed a contract * *."

Hurr indicated that various provisions of the Company's final offer or the "contract" were improperly or prematurely implemented because the Union had not yet ratified the final offer. Thus, after August 10, Hurr said that the Union has "challenged" the implementation of various terms of the contract.

Implicit in Hurr's testimony is the Union's position that there is an "agreement" or "contract" before ratification, and there is a different "agreement" or "contract" after ratification. Since the Union has not ratified the Company's final offer or signed off on the final offer it is difficult to comprehend the nature of Hurr's characterization of the final offer as an "agreement" or "contract". It is sufficient to state that there is no evidence that the Union accepted the Company's final offer. Working under the Company's implemented final offer does not establish acceptance of the offer by the Union. Absent acceptance, there has been no such agreement between the parties.

Hurr said that the Union "had a ratification meeting, and they chose not to vote on the contract but to go back to work under it while we tried to work things out." Accordingly, the Union membership chose not to

vote on the Company's unilaterally implemented work rules.

B. UNION'S RIGHT TO STRIKE

In light of the Union's assertion that a "contract", "implied" or interim agreement has been in effect with the Company it would be useful to consider whether the Union has the right to strike.

The duty to arbitrate is the quid pro quo for a no strike clause in a collective bargaining agreement. *Textile Workers Union v. Lincoln Mills*, 353 US 448 (1957). After expiration of the collective bargaining agreement, unless the grievance is based on a right that arguably had accrued or become vested under the agreement prior to its termination, the grievance is not arbitrable. *Nolde Bros. Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 97 S. Ct. 1067 (1977).

The instant grievance arose after the 1988 contract expired and after an impasse in negotiations. More precisely, the instant grievance arose during the implementation of the Company's final offer. Thus, the Union is no longer bound by a no-strike clause. If the Union can strike, it is highly unlikely that the Company would intend to submit a dispute to arbitration.

It must be underscored that arbitration decisions are final and binding. The scope of review by the judiciary is extremely narrow. See, e.g., *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987). Thus, unless there is convincing evidence to the contrary, it is improbable that the Company would agree to submit a dispute to final and bind arbitration if the Union retained its right to strike.

Before proceeding further, it should be noted that the Company cannot compel the Union not to strike, given the facts and circumstances which have been presented in this case. Hurr, in fact, acknowledged that he was unaware as to how the Company can prohibit the Union from taking strike action in the absence of the Union signing off on the Company's final offer.

It is significant that none of the Union's witnesses indicated that the no strike clause in the Company's final offer, which was identical to the no strike clause in the expired contract was applicable to their present situation. International Representative Roger Bernardez referred to another provision of the Company's final offer, namely Article XIV, Section 2 of the Company's final offer which he said provides the Union with the right to strike. Article XIV, Section 2 provides as follows:

"Section 2. Negotiations

> Negotiations upon such proposed amendments or changes of the terms of this Agreement covered in the notices of desire to amend shall begin not later than 50 days prior to the expiration date of the expiration date of any subsequent yearly period and shall continue until agreement is reached, or the contract terminated, and during said negotiations this Agreement shall remain in full force and effect, except that in the event negotiations are continued by mutual agreement beyond the appropriate expiration date, either party may, at any time thereafter, terminate this agreement on 10 days notice to the other party."

Relying upon this provision of the Company's implemented final offer, Bernardez said that "either party can terminate the agreement with ten days' notice." He went on to indicated that if the Union gives the Company a ten (10) day notice it has the right to strike; should the Company provide the Union with ten (10) days' notice under Article XIV, Section 2, the Company can lockout the employees.

Before considering the merits of Bernardez's interpretation of Article XIV, Section 2 of the expired 1988 contract. That Article XIV, Section 2 is the same in both the expired contract and the implemented offer is not surprising.

It is a basic principle of federal labor law that after an impasse in bargaining has been reached, an employer is free to implement the terms of the final offer. See, e.g. *NLRB v. Katz*, 369 U.S. 736 (1962). As a result, the provisions of Article XIV, Section 2 of the Company's final offer are identical to Article XIV, Section 2 of the expired contract. As a corollary to this basic principle it is also irrelevant that the Company's final offer which it unilaterally implemented, contained arbitration and no-strike clauses which were included in the expired contract.

Bernardez [as well as Hurr] indicated that Article XIV, Section 2 of the Company's final offer was applicable to the "agreement" that had been in effect since August 10, 1991. Bernardez indicated that the parties have held several meetings between August 10, 1991 and the beginning of 1994 which were negotiating sessions.

One such meeting, held on June 26, 1992, took place at the request of Hurr. A memorandum of Agreement signed on July 16, 1992 by Searle and the

members of the Union bargaining Committee along with Bernardez, in relevant part, stated as follows:

"MEMORANDUM OF AGREEMENT

Memorandum of Agreement between Aircraft Braking Systems Corporation (the "Company") and International Union United Automobile, Aero space and Agricultural Implement Workers of America and its Local 856 (the "Union"):

1. At the request of Donald Hurr, Chairman of the Union's Bargaining Committee, a meeting was held between Donald Hurr and Edward L. Searle, Director of Human Resources for the Company, on June 26, 1992 at which Mr. Hurr stated that certain items must be clarified between the contract implemented by the Company can be ratified. As a result of that meeting, the parties agree as follows:

A. The Union agrees to all of the terms and conditions of the implemented contract imposed by the Company on August 10, 1991 with the exception of the following items:

(i). Funding of S.U.B. plan.

(ii). Changes to Comprehensive Medical during life of the Agreement; amount of contributions for Comprehensive Medical; contributions by retirees for Comprehensive Medical; and reimbursement for Medicare.

(iii). Effective date of 401(k).

(iv). Skilled trades sub-contracting (Article II, Section 25, Paragraph 148).

(v). Skilled trades subcontracting (Article II, Section 25, Paragraph 148).

(vi). Effective date of Agreement.

**"

Thus, the Memorandum of Agreement indicates that at Hurr's request, the parties met to "clarify" six "items before the contract implemented by the Company can be ratified." The Memorandum goes on to provide that the Union agrees to all of the terms and conditions of the implemented contract imposed by the Company on August 10, 1991 except for six (6) enumerated items.

The reasonable inference to be drawn from the Memorandum of Agreement is that, in fact the Union has not agreed to the "contract implemented" and "imposed" by the Company since August 10, 1991. Moreover, agreement by the Union was conditional upon the "clarification" of the six (6) enumerated items.

Paragraph 1. E. of the July 16, 1992 Memorandum provides as follows:

> "This Memorandum of Agreement shall lapse by its terms thirty (30) days from the date of execution, at which time if the parties have reached no agreement hereunder, the parties shall revert to their respective postures as of July 1, 1992". #10

The "respective postures of the parties as of July 1, 1992" was that the bargaining unit employees worked under the Company's implemented final offer. It is obvious from the July 16, 1992 Memorandum that the Union did not accept the Company's offer. Furthermore, the reasonable inference to be drawn from the Memorandum of that the Union would not accept the Company's final offer until ratification. And ratification by the Union membership would not materialize until the six (6) "items" were "clarified to the satisfaction of the parties".

In any event, Article XIV, Section 2 of the 1988 contract expired as of 6:00 p.m., August 10, 1991. Article XIV, Section 2 is merely a clause of the Company's final offer. Indeed, by its terms, the provisions irrelevant to the instant dispute and has no bearing on the issue of arbitrability. Clearly, the terms of Article XIV, Section 2 have not been applicable to the parties since 6:01 p.m. on August 10, 1991. Accordingly, the Union did not give up its right to strike which is well established as the quid pro quo for the Company's agreement to arbitrate disputes.

II.
ORDER OF UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

In 1993, the Company sought an injunction in the Eastern Division of the United States District Court, Northern District of Ohio, against a pending arbitration proceeding and the Union filed a counter-claim seeking an order compelling arbitration. The action by the Company resulted from a grievance filed by the Union on September 3, 1991 in which it claimed that the Company violated its unilaterally implemented contract because it refused to pay a bonus as provided in Paragraph or

Amendment "3" of the Company's Final Proposal On All Economic and Non-Economic Issues that was implemented on August 10, 1991 at 6:01 p.m.

The District Court Order denied the Company's motion and granted the Union's motion. The Court held that "an agreement to arbitrate does exist and the instant grievance is within the terms of the arbitration agreement". Accordingly the Court ordered the Company to submit the grievance filed by the Union to binding arbitration pursuant to the Company's implemented final offer.

It is important to distinguish between the Court's role and the role played by the Arbitrator with respect to the issue of arbitrability. The distinction was explained by the Arbitrator in *Sycon Corp.*, 87 LA 206 (Abrams, 1986).

> "It is important to distinguish the role of a court in a suit to enforce arbitration and the role of the arbitrator ruling on an issue of arbitrability. The court's job is to send the parties to arbitration unless it is clear that they had agreed not to arbitrate a matter. By comparison, when an arbitrator is asked to decide whether a matter is arbitrable, he or she should not apply a presumption. Arbitrators who have stated that parties must be presumed to have intended that their procedure have a broad reach are confusing their job as "contract reader" with the court job of "arbitration facilitator". The arbitrator must examine the terms of the parties' agreement to determine what they actually intended. The language of the agreement (interpreted if it is ambiguous in light of past practice and

> bargaining history) will indicate if they intended that all matters would be arbitrable, or that a presumption would be applied in favor of arbitrability, or that matters which arise after the expiration of an agreement can be arbitrated under the terms of the expired agreement. * *" At page 208

As I have previously indicated, the instant grievance arose after the expiration of the parties' collective bargaining agreement and after they bargained to impasse. Clearly, the grievance arose under the Company's implemented offer.

The Court's order is not binding upon this Arbitrator. Were I to comply with the Court's order I would have to ignore the evidentiary record in this case. In other words, I would be abdicating my role as an Arbitrator in determining the intent of the parties based upon the evidentiary record.

Having established my appropriate role in this dispute, I would be remiss in not considering Searle's letter dated August 16, 1991 which was sent to Hurr and, in part was relied to by the District Court Judge in issuing the order to arbitrate. In his letter, Searle stated:

> "You are hereby notified that Aircraft Braking Systems' employees engaging in any actions involving a sit-down, stay-in, slow-down, or any curtailment of work, or restriction or interference with production are in violation of Article V of the Basic Labor Agreement. Any employees engaging in such action will be terminated

> in accordance with the Basic Labor Agreement.
>
> Also, in the event such incident occur the Company will demand arbitration to determine to what relief the Company is entitled including including [sic] monetary damages."

At the hearing before the District Court Judge, Searle indicated that the arbitration clause was "put in place when we implemented the final offer." However, it should also be underscored that Searle indicated in his August 16, 1991 letter that employees engaging in the actions which he described in his letter, were "in direction violation of Article V. Of the Basic Labor Agreement" and "will be terminated in accordance with the Basic Labor Agreement." Article V contains the no strike provisions.

The reasonable inference to be drawn from Searle's August 16, 1991 letter is that the arbitration clause was the quid pro quo for the prohibition on the Union's right to strike. Thus, Searle referred to the actions of the employees which were "in direction violation of Article V." Article V contains the no strike clause. As he indicated in his letter", the event such incidents occur the Company will demand arbitration* *."

As I have previously indicated, the evidence in this case establishes that under the implementation of the Company's final offer, the Union, in fact, has not given up its right to strike. The Union's witnesses have consistently stated that as long as the employees work under the Company's final offer they will not strike.

As I have indicated already, employees cannot work and strike at the same time, inasmuch as a strike is

a concerted cessation of work. Thus, the statement by the Union's witnesses that as long as the employees work there will be no strike action, is meaningless.

In addition, the Union's witnesses, [especially Bernardez] indicated that on ten (10) days notice under Article XIV, Section 2, the negotiations clause, the Union can strike and upon ten (10) days notice under Article XIV, Section 2, the negotiations clause, the Union can strike and upon ten (10) days notice the Company can lockout. The reasonable inference to be drawn from a careful evaluation of the testimony of the Union's witness is that the Union has not given up it [sic] right to strike and is not bound by the no-strike clause of the implemented final offer of the Company.

It is obvious that in writing the August 16, 1991 letter to Hurr, Searle was mistaken in believing that the Union was bound by the no strike clause. Accordingly, his reference to arbitration was not based upon consideration and is unenforceable.

The fact is that the Company has not voluntarily submitted any dispute to arbitration since August 10, 1991. Bernardez acknowledged that except for an arbitration which took place pursuant to the Labor Board's deferral policy, the Company has consistently taken the position that it will not implement the "arbitration provision."

CONCLUSION

I have carefully read the decision and award in the arbitration between the parties with respect to the issue of lump sum payments, that was issued on September 27, 1993 (AAA No. 53 30 300 00073). It should be noted that

the instant evidentiary record is different than the record before the Arbitrator in the previous hearing.

In addition, with respect to whether the Company is bound to arbitrate, my analysis has been based upon well established principles of arbitration and familiar principles of national labor law. The September 27, 1993 decision is of no persuasive value in arriving at the threshold decision in this case. It should also be noted that the Company has filed an appeal to overturn the arbitration decision that was issued on September 27, 1993.

The conclusion that no "implied" or "interim" agreement exists between the parties is reinforced by the conduct of the employees subsequent to August 10, 1991. The evidentiary record establishes that the bargaining unit employees refused to work overtime, worked "strictly to contract, engaged in disruptive conduct and caused efficiency to decline. Such behavior continued until late September or October, 1991.

The conduct of the employees was due to their hostile negative reaction to the Company's final offer. Thus, the shirts worn by the employees indicated "FYLO" which indicates "Forget Your Last Offer" or "F-K Your Last Offer."

Further evidence that the Union did not accept the Company's final offer is the sign that was placed on a billboard close to the plant which indicated the following:

> "HEY LORAL/ABS...
> UAW 856 NEEDS A FAIR
> LABOR CONTRACT.
> FORGET YOUR LAST OFFER
> Paid for by the UAW Local 856."

Hurr's testimony with respect to the sign merely provides further compelling evidence that the Union did not accept the Company's final offer:

> "**Q. Do you remember when it was put up?
>
> A. I'm not exactly sure. It was after a union meeting that we had. Some people felt that we would like to put this out in front of the plant there that we wanted a fair contract.
>
> Q. Was it six months ago? Was it in '94? Ws [sic] it in '90? Give me a ballpark.
>
> A. I couldn't tell you. I think we probably voted on it when there was an open space.
>
> Q. When did you–when did you vote on it?
>
> A. We didn't. It went to a union committee.
>
> Q. When's the first time you saw it?
>
> A. I couldn't tell you, '92, '93.
>
> Q. Could it have been the beginning of '94?

A. Could have been.

Q. "Hey, Loral/ABS ... forget your last offer." And the members voted on this? The members voted on this?

A. No.

Q. This was not your doing?

A. No, the members.

Q. When the members said "Forget your last offer," what were they referring to?

A. I guess the final proposal.* *"

To sum up, the duty to arbitrate must be based upon an agreement. The 1988 contract between the parties had expired at 6:00 p.m. on August 10, 1991. The Company's offer was rejected and the parties had reached an impasse in bargaining. The Company implemented its final offer at 6:01 p.m. on August 10, 1991.

The Company has no binding obligation to arbitrate the instant dispute which arose under the Company's implemented final offer. No such agreement to arbitrate can be implied merely from the fact that employees worked for the Company after August 10, 1991. Mutual assent to a continuation of the expired contract and the Company's final offer cannot be implied in light of the evidentiary record in this case.

Moreover, the obligation to arbitrate cannot be implied since the Union established that it was not bound by the no strike clause in the Company's final offer. As the Supreme Court stated in: *Gateway Coal Company v. United Mine Workers*, 414 U.S. 368, (1974) "* * the agreement to arbitrate and the duty not to strike should be construed as having coterminous application * *." At page 374.

The evidentiary record warrants the conclusion that neither the Company nor the Union intended to be contractually bound after 6:00 p.m. on August 10, 1991. The fundamental principles of contract law apply in this case. The Company's final offer was not accepted expressly or impliedly by the Union.

The Company's position that there is no agreement to arbitrate the instant dispute is sustained. The Union failed to carry its burden of proving that such an agreement existed between the parties.

AWARD

In light of the aforementioned considerations, the Company is under no contractual duty to arbitrate the instant dispute. The grievance is not arbitrable.

Accordingly the grievance is dismissed.

Dated: March 1, 1995
Cuyahoga County
Cleveland, Ohio

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(2)

No. 95-0121

Supreme Court, U.S.
FILED
AUG 23 1995
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

AIRCRAFT BRAKING SYSTEMS CORPORATION,
Petitioner,

v.

LOCAL 856, INTERNATIONAL UNION UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS and AMERICAN ARBITRATION ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

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QUESTIONS PRESENTED

Whether an employer may be compelled to arbitrate a grievance with a union where the employer had implemented its final contract offer which included a grievance arbitration provision and where the parties actually arbitrated grievances and where the other conduct of both parties showed their intent to be bound by the arbitration clause.

Whether a district court may enter final judgment granting a counterclaim compelling an employer to arbitrate a grievance after a hearing on a preliminary injunction where the employer was given every opportunity to develop its position.

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AIRCRAFT BRAKING SYSTEMS CORPORATION,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION

Respondent Local 856, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW, respectfully requests that this Court deny the petition for *writ of certiorari* which seeks review of the Sixth Circuit's opinion below. That opinion is unreported, but is reprinted in the Petition for Certiorari at Appendix A.

STATEMENT OF THE CASE

This case involves a labor dispute between Petitioner Aircraft Braking Systems Corporation (hereafter ABS or the Company) and Respondent International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW, and its Local 856 (hereafter UAW or Union) over the Company's refusal to arbitrate a grievance over its failure to pay annual bonuses.

The parties' previous labor agreement expired; when the parties were unable to reach agreement on a successor contract, the Company implemented its "final offer" which contained, among other items, a revised arbitration clause, a no-strike clause and the promise of annual bonuses. In response, the UAW members continued to work under the terms of the Company's Final Proposal, and the Company paid the wages and benefits pursuant to that Final Proposal, but it ultimately did not pay a promised lump sum bonus of $800. The dispute here arose over the Company's refusal to pay that annual bonus.

The terms of the Company's implemented offer incorporated by reference the grievance and arbitration provisions of the expired contract, with an express proposal to modify those provisions by requiring the parties to use the American Arbitration Association rather than a permanent panel, as was the practice in the old contract.

The Company's Human Resources Director admitted at the hearing in this matter that the Company did in fact implement the AAA arbitration procedure in the Final Proposal. Except for the change to AAA, the grievance procedure from the old contract carried over in all respects into the implemented Final Proposal.

Moreover, at hearing, the Company proffered as a hearing exhibit its own document evidencing the integration of the carried-over contract terms, along with the changes, which constituted the "complete" implemented

agreement. This document, called the "Rough Draft," notably contains a "no-strike" clause and the arbitration clause.

Further compelling evidence of the existence of an agreement to arbitrate as the *quid pro quo* for a no-strike pledge appeared in a letter dated August 16, 1991, wherein the Company notified the Union that it would enforce the no-strike clause through arbitration.

During the time after the labor contract expired, there is no dispute that both Aircraft Braking and the UAW recognized and honored the terms of the implemented offer. The UAW did not strike and Aircraft Braking paid wages and benefits according to its Final Proposal until it refused to pay the annual $800 bonus.

There is likewise no dispute that the parties utilized the revised arbitration procedure, without incident, during the two-year period between August 10, 1991 and the date of the court hearing in April 1993. The Company admitted that it arbitrated or used the assistance of the arbitrator to resolve 31 disciplinary grievances that arose during the hiatus period. Three other cases were scheduled for arbitration on April 29 and April 30, 1993, the days immediately following the hearing.

In an unrelated administrative proceeding before the National Labor Relations Board, the Company admitted that it had in effect an arbitration clause and that it considered itself bound by the arbitration clause. As a result, the NLRB deferred a pending UAW unfair labor practice charge to arbitration.

After ABS refused to pay the $800 bonus, the Union filed a grevance protesting the refusal to pay. A grievance was defined by the parties to include any claim "in connection with wages and rates of pay." ABS does not contest that the grievance falls within the scope of that definition.

The Company processed the grievance beyond Step Three of the procedure, just short of arbitration. The UAW timely demanded arbitration and Aircraft Braking agreed the grievance was certified for arbitration.

However, when the scheduled May 1993 arbitration hearing date drew near, ABS departed from its pattern of arbitrating grievances and instead, inexplicably filed this action, seeking to enjoin the arbitration.

In its Complaint, the Company sought injunctive relief, a declaratory judgment, and an order staying the arbitration of the pending grievance involving the wage bonus dispute. The Union filed an Answer and Counterclaim to Compel Arbitration. A hearing was then held on the Company motion for preliminary injunction, and it had the opportunity to fully litigate its case; the Union opposed the preliminary injunction and adduced evidence by way of the testimony of union witnesses and the cross-examination of the Company witness.

At the close of the hearing, Petitioner's counsel requested the opportunity to submit post-hearing briefs in opposition to the Union's counterclaim to compel arbitration. The district court granted the request and invited the parties to submit simultaneous briefs. Based on the evidence adduced at hearing, to conform the pleadings to the proof presented, the Union filed a combined "Supplemental Post-Hearing Brief and Motion for Judgment on the Counterclaim." ABS then moved the court to grant both a preliminary and permanent injunction "based upon the record."

The district court denied the Company's application for a preliminary injunction and granted the Union judgment on the counterclaim, ordering the Company to submit the bonus grievance to binding arbitration. The court made extensive factual findings, noting that "every tangible indicia of the intent of the parties shows that both sides believed and behaved according to the view that a

grievance-arbitration agreement was in force."[1] (See Petition, App. B, p. 36a.)

Following ABS's appeal, the Sixth Circuit concluded that, "[T]he district court's findings that the actions of the Union demonstrated acceptance of ABS's 'Final Proposal,' namely, an implied interim contract containing an agreement to arbitrate was not clearly erroneous, and the district court properly applied the law to the facts of this case." (See Petition, App. A, p. 25a.)

Furthermore, as to ABS's claim that Fed. R. Civ. P. 65(a)(2) was not complied with when the district court consolidated the hearing on the motion for a preliminary injunction with the merits, the Circuit observed that, "ABS was not prejudiced by the district court's failure to give notice. . . ." (See Petition, App. A, p. 29a.)

In its petition, ABS argues that it cannot be compelled to arbitrate a grievance even where its final proposal contained an arbitration clause and where the conduct of both parties was consistent with an interim agreement. ABS further argues that before the Sixth Circuit it identified new evidence that it wished to produce before the district court and therefore it was prejudiced by the court's consolidation.

None of ABS's arguments has merit and the Petition should be dismissed.

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[1] Later, the underlying grievance was arbitrated and the arbitrator issued an award in favor of the Union. ABS then filed a second lawsuit to vacate the arbitration award.

On June 1, 1993, ABS appealed the District Court's order compelling arbitration. Subsequently, on January 8, 1994, ABS filed a motion with the Sixth Circuit to remand the appeal to the district court, for consolidation and trial with the lawsuit to vacate the arbitration award. ABS's theory was that the district court's Order of May 14, 1993 was not final and appealable because ABS had not been afforded the chance to "fully litigate."

On March 7, 1994, the Sixth Circuit rejected that contention and denied ABS' motion to remand the appeal. (See Petition, App. A, p. 13a n.2.)

REASONS TO DENY THE WRIT

I. THE SIXTH CIRCUIT CORRECTLY HELD THAT THE EMPLOYER SHOULD BE COMPELLED TO ARBITRATE A GRIEVANCE WHERE IT IMPLEMENTED ITS "FINAL PROPOSAL" WHICH INCLUDED A GRIEVANCE ARBITRATION PROVISION, AND WHERE THE CONDUCT OF BOTH PARTIES SHOWED THEIR INTENT TO BE BOUND BY THE ARBITRATION CLAUSE.

The Court should deny the writ because the Sixth Circuit properly affirmed the findings of the trial court which concluded that the Company proffered a grievance and arbitration clause to the Union, the Union accepted the Company's offer and did not strike, the parties actually arbitrated other disputes between them and then the Company unjustifiably refused to arbitrate the grievance over the disputed bonuses. The Sixth Circuit's opinion in a factually specific dispute is consistent with both historic and recent precedent of this Court and there is no dispute among the circuits.

ABS urges the Court to grant certiorari by asserting that the Sixth Circuit, by concluding that the parties had reached an "implied interim agreement," put itself in conflict with this Court's opinions. (See Petition, at 10-11, 14.) ABS asserts that the Sixth Circuit's decision compels ABS to arbitrate the dispute "solely by operation of law." (Petition at 14.) ABS is incorrect.

This Court has long encouraged the use of the arbitration process to resolve disputes in labor management relations. Specifically, this Court has observed as follows:

> [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government.
>
> * * * *
>
> The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the

> duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or agreed to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.
>
> *Steelworkers v. Warrior Navigation Co.*, 363 U.S. 574, 581-3 (1960).

Furthermore, this Court has also observed, "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

Here, as the Court of Appeals observed, the district court made detailed findings and concluded as follows:

> Quite simply, every tangible indicia of the intent of the parties shows that both sides believed and behaved according to the view that a grievance-arbitration agreement was in force between the parties. It is impossible for this court to conclude otherwise because the court is necessarily constrained by the relevant facts and applicable law.
>
> Plaintiff's decision to unilaterally implement a contract is plainly an offer of "interim" employment. No other legal significance can be attached to the August 10, 1991 letter. By its terms, that letter sought neither ratification nor reply by the union.

> To the contrary, acceptance of such an offer is manifested by continuing performance. The unilateral offer contained as one of its terms an agreement to arbitrate grievances. If accepted, plaintiff can no more renege on the promise to arbitrate than it could decide to reduce wage scales or eliminate promised health benefits after work was performed.
>
> Plaintiff's unilateral offer for interim employment was accepted. Plaintiff's cross-examination of defendant's president, Don Hurr, clearly established the fact that the union has agreed to comply with the terms of interim employment while continuing to seek a more advantageous permanent agreement. Mr. Hurr even agreed with plaintiff that the no-strike clause referenced in the August 16, 1991 letter was implemented. (T. at 66.) Most telling of all, the employees have continued to work for over 20 months under the imposed terms without violation of the no-strike clause. (See Petition, App. B, p. 37a-38a.)

Thus the district court and the Court of Appeals concluded that the unique evidence of this case demonstrated that ABS offered the grievance and arbitration language to the Union, the Union accepted the proposal by not striking and the parties conducted themselves in a manner which clearly demonstrated that ABS intended to be bound by its offer to resolve any dispute by binding arbitration.

Thus the Sixth Circuit has clearly followed this Court's dictates as reflected in the *Steelworker's* trilogy and in *Lincoln Mills* to the effect that the Congress in § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA"), was encouraging arbitration, that doubts should be resolved in favor of coverage, and that there is normally a link between an arbitration provision and a no-strike clause.

Petitioner specifically asserts that the Sixth Circuit's opinion puts itself in conflict with *Gateway Coal Co. v.*

The Mine Workers, 414 U.S. 368 (1974) and *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991). (*See* Petition at 10, 11, and 14.) Again the Petitioner is in error.

In *Gateway Coal Co.*, this Court, citing the *Steelworkers* trilogy again enunciated that there is a "presumption of arbitrability for labor disputes" which "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* at 377-378. This Court also observed again that an arbitration agreement is generally linked with a no-strike obligation and absent an agreement to the contrary, "the agreement to arbitrate and the duty not to strike should be construed as having coterminous application." *Id.* at 382.

This Court then concluded that it was proper for the district court to enjoin the union from striking and for it to compel the union and the company to arbitrate the underlying dispute. *Id.* at 387-388. The Circuit Court's opinion in the instant case is entirely consistent with *Gateway Coal Co.* because the Sixth Circuit concluded that the Union manifested its acceptance of the Employer's offer of a grievance and arbitration procedure by continuing to work. (See Petition, App. A, p. 25a.)

Nor does this Court's 1991 opinion in *Litton* conflict with the Court of Appeals decision. In *Litton*, this Court merely concluded that after the termination of a collective bargaining agreement this Court would not impose a statutory duty to arbitrate post-expiration disputes. *Litton*, 501 U.S. at 205-207. In *Litton*, the employer did not offer, post-expiration, a final proposal that included a grievance and arbitration clause and a no-strike clause. Thus the circumstances of *Litton* are factually distinguishable from those raised in the instant case.

The Petitioner offers no compelling reasons why the Court should review the area that it recently addressed in *Litton*. Petitioner argues that its petition should be

granted because there will be uncertainty over what constitutes an interim agreement. The Respondent disagrees because the facts and circumstances here are unique. To the extent that a rule may be drawn from this case at all, it provides that if an employer offers a grievance arbitration clause which includes a no-strike clause and the Union does not strike and the parties otherwise act in a way consistent with an offer and an acceptance, the parties are going to be bound by the arbitration agreement.

ABS next argues that it "is bound by the interim implied agreement to arbitrate forever." (Petition at 15-16.) The Sixth Circuit has already addressed this argument and dismissed it thusly, "A labor contract of indefinite duration or one that does not specify a time or manner of termination is terminable at the will of either party upon reasonable notice to the other party." (See Petition, App. A, p. 25-26a n.4).)

ABS then asserts that if the Union chooses to strike rather than arbitrate a dispute, the Company would not be entitled to injunctive relief against the strike "as it is a party only to an interim implied agreement and not a collective bargaining agreement." (Petition at 16.)

Essentially the Employer is complaining that by agreeing to an interim agreement it does not achieve the full benfits of a collective bargaining agreement, but of course neither does the Union which is forced either to work under conditions that it has not agreed to or to strike. Furthermore, the Employer created its own problem. It did not have to offer a grievance and arbitration clause, it did not have to impose its final offer and it should not be able to complain that it is being treated unfairly because it is being forced to honor its promises.

Finally the Petitioner argues that the Sixth Circuit in this case and the Eleventh Circuit as a result of its decision in *United Paper Workers Int'l Union vs. Int'l Paper Co.*, 920 F.2d 852 (11th Cir. 1991), are at odds with the

Tenth Circuit's opinions in *United Food and Commercial Workers Int'l Union, AFL-CIO, Local 7 vs. Gold Star Sausage Co.*, 897 F.2d 1022 (10th Cir. 1990) and *International Union, United Mineworkers vs. Big Horn Coal Co.*, 916 F.2d 1499 (10th Cir. 1990), *cert. denied*, 502 U.S. 1095 (1992). Again the Petitioner is in error, there is no conflict.

The Tenth Circuit's opinions do not conflict because as the Sixth Circuit observed by quoting the Eleventh Circuit in *United Paper Workers*, "the *Gold Star* court made clear . . . that 'the Union does not even allege that the Company's last offer is, in some sense, a contract between the parties, much less point to any facts in the record that might support such an assertion." (Petition, App. A, p. 20, quoting *United Paper Workers*, 920 F.2d at 858.) The Sixth Circuit went on to favorably quote the Eleventh Circuit as follows:

> [T]he Tenth Circuit opinions can be cited for the proposition that such additional evidence of union acceptance does establish an interim contract created by an implemented final offer:
>
> > "Employer implementation of a last and final offer is, by itself, insufficient to invoke jurisdiction absent some manifestation of acceptance of the offer sufficient to create a contract. . . . The contract between the parties required for jurisdiction need not be a written, signed collecitve-bargaining agreement, but may exist as any informal agreement between the parties significant to the maintenance of labor peace between them. It suffices that the parties' intent to abide by the agreed-upon provisions of any such informal agreement is in some manner manifest."
>
> (Petition, App. A, p. 20-21a citing *Big Horn*, at 1501-1502 (emphasis added) (citing *Gold Star*, 897 F.2d at 1026). . . .)

Furthermore, *Gold Star* and *Big Horn* are both cases which are markedly different from the facts here. In

Gold Star, the Union filed grievances claiming that the company's actions violated the *expired* collective bargaining agreement. *Gold Star, supra,* at 1023. On appeal, the Union argued that any dispute that would have been arbitrable under the expired agreement is arbitrable post-termination absent a clear indication that post-contract arbitration was not intended. *Id.* at 1024. The Court rejected such an approach.

Here, however, the Court of Appeals concluded that the parties clearly intended by their deeds to agree to arbitrate cases post-termination, which is dramatically different from the circumstances in *Gold Star*.

In *Big Horn Coal Co.*, the contract had expired, the company implemented its last offer which included a grievance and arbitration clause, the union initially continued to work, but then commenced a strike. Subsequently, the union unconditionally returned to work and the company alleged that 18 employees were being terminated for picket line misconduct and then refused to arbitrate the grievance filed by the union. *Big Horn Coal Co.*, 916 F.2d at 1501.

Big Horn Coal Co. is clearly distinguishable from the instant case because the grievance arose after the union had struck the facility and thus, after it had clearly rejected the employer's interim contract by engaging in a work stoppage. Here the underlying grievance arose during the time period in which the Union was continuing to work. Thus there is no conflict between the Circuits as alleged by the Petitioner.

It therefore becomes clear that the Petition should be denied because the Sixth Circuit's opinion is consistent with prior opinions of this Court and there is no conflict among the circuits. Furthermore, a denial of the Petition encourages the long-recognized policy of encouraging the arbitration of disputes where the parties have agreed to do so.

II. THE SIXTH CIRCUIT PROPERLY HELD THAT THE DISTRICT COURT MAY ENTER FINAL JUDGMENT GRANTING A COUNTERCLAIM COMPELLING AN EMPLOYER TO ARBITRATE A GRIEVANCE WHEN AT THE HEARING ON A PRELIMINARY INJUNCTION THE EMPLOYER WAS GIVEN EVERY OPPORTUNITY TO DEVELOP ITS POSITION.

Petitioner claims that it was prejudiced when the district court allegedly failed to notify the parties of its intention to consolidate the trial on the merits with the preliminary injunction hearing. (Petition, at 17.) The writ should be denied because the Sixth Circuit has already determined the Petitioner was given every opportunity to develop its position below and thus suffered no harm.

This Court has stated that the purpose of the notice provision of (Rule 65(a)(2) is to provide the parties of a consolidated action with "a full opportunity to present their respective cases." *University of Texas v. Camenisch,* 451 U.S. 390, 395 (1981). In keeping with this purpose, Petitioner must demonstrate that the failure to notify prejudiced its case and did not merely constitute harmless error. *Wolfahrt v. Memorial Medical Center,* 658 F.2d 416, 418 (5th Cir. 1981); *United Bhd. of Carpenters and Joiners of America, Dresden Local No. 267 v. Ohio Carpenters Health and Welfare Fund,* 926 F.2d 550, 558 (6th Cir. 1991).

The trial court's failure to notify Petitioner of its decision to enter final judgment did not prejudice Petitioner because it had the opportunity to defend the counterclaim fully. Petitioner cannot claim surprise because the record clearly demonstrates that it had the opportunity to answer the legal arguments set forth in the counterclaim. At the close of the hearing, Petitioner's counsel asked for and received the opportunity to submit post-hearing briefs on

the counterclaim.[2] Subsequently, Petitioner filed its Answer to the Counterclaim on May 6, 1993, and its Post-Hearing Reply Memorandum on May 5, 1993.

Moreover, the Court's one week deadline for submitting post-hearing briefs did not cause Petitioner undue prejudice. The Court shortened its briefing schedule to accommodate counsel for Petitioner.

Furthermore, the trial court's failure to give timely notice did not prejudice Petitioner because Petitioner's conduct after the preliminary injunction hearing manifested its satisfaction with the record. Petitioner indicated its satisfaction in two ways. First, its post-hearing reply memorandum sought the court's final ruling on both the preliminary and permanent injunction claims "based upon the record." In *Fenstermacher v. Philadelphia National Bank*, 493 F.2d 333 (3d Cir. 1974), the Third Circuit stated that submission of a brief seeking a final adjudication on the merits after a 65(a)(2) consolidation prevented a party from later claiming that notice of the consolidation was not timely.[3] (*Id.* at 337.)

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[2] The colloquy proceeded as follows:

> THE COURT: Do I have all of your brief papers that I will need? Do you wish to submit any more based on what you have heard?
>
> MS. MACKENZIE: Your Honor, if I might, *we only received the Defendant's response to our papers this morning. And I would therefore request that we be permitted to submit post hearing briefs, if your Honor wishes us to clarify further the issues that are raised here.*
>
> THE COURT: May I suggest whatever else you wish to submit, you submit within one week simultaneously if you will. The deadlines here are short but I understand counsel will not be totally available in the next month or so and I would like to get it done for you.

[3] Although there was evidence in *Fenstermacher* that both parties had agreed that all relevant evidence was presented at the preliminary injunction hearing, the court made it clear that "[e]ven had there been no agreement that all the evidence was presented," the

Just as in *Fenstermacher*, Petitioner in this case manifested its satisfaction with the record as to all the issues presented, both in its claims and Respondent's counterclaims, by filing its Answer to the Counterclaim and its post-hearing reply memorandum. Nowhere in its reply memorandum does Petitioner argue that the evidence presented at the preliminary injunction is insufficient to address fully its arguments.[4]

Second, Petitioner manifested its satisfaction with the record, in its brief on appeal, by "reargu[ing] the same issue in the same way rely[ing] on the same evidence." (See Petition, App. A, p. 28a.) In *United Bhd. of Carpenters and Joiners of America, Dresden Local No. 267 v. Ohio Carpenters Health and Welfare Fund*, 926 F.2d 550 (6th Cir. 1991), the Sixth Circuit held that a district court's failure to notify plaintiff of its *sua sponte* motion to dismiss was harmless error because the plaintiff's memorandum in opposition was an "effective response" to the motion and, on appeal, the plaintiff "reargued the same issues in the same way, thereby giving rise to a very strong inference that the legal position taken in the memorandum in opposition . . . reflected the [plaintiff's] mature position." *Id.* at 558. In addition, the Sixth Circuit emphasized that the plaintiff did "not indicate what additional measures it might have taken"

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plaintiff acquiesced to the consolidation by submitting his brief. 493 F.2d at 337.

[4] In *Fenstermacher*, the Third Circuit, rather than determining whether the trial court's failure to timely notify constituted prejudicial error, held that the plaintiff waived his right to raise the issue by submitting his brief. 493 F.2d at 337. Also, in *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907 (1st Cir. 1989), the First Circuit found that similar conduct amounted to acquiescence to the court's decision to consolidate and constituted a waiver. *Id.* at 913-914. Arguably, Petitioner, by its conduct in submitting a brief and failing to timely object to the consolidation, simply waived its right to claim that the trial court's final judgment prevented petitioner from fully presenting its case.

had the court timely notified it of its motion to dismiss. *Id.*

The Sixth Circuit decision from which this certiorari petition arises found *United Brotherhood* controlling in this instance. Like the plaintiff in *United Brotherhood,* Petitioner's arguments on appeal mirror those in its post-hearing reply memorandum—namely, that no agreement existed between the parties. These arguments reflect "its mature position." Accordingly, the trial court's failure to timely notify Petitioner constitutes harmless error that in no way diminished Petitioner's opportunity to litigate fully its case.

Finally, the trial court's failure to notify Petitioner does not prejudice Petitioner because Petitioner's "new evidence" does not alter the basis of the trial court's ruling. Petitioner now asserts that, had it been given timely notice, it "would have taken the depositions of Union representatives who are more forth-right than" Don Hurr (Reply Brief of Appellant, p. 10) and points to the testimony of Roger Bernardez, a UAW international representative present at the negotiations between Petitioner and Respondent, who testified at the arbitration hearing. (See Petition, at 18.)

As to Petitioner's first assertion, the Sixth Circuit correctly characterized it as nothing more "than a claim that if given notice of a possible adverse decision, Petitioner would have engaged in a fishing expedition for favorable evidence." (See Petition, App. A, p. 29a, n.5.) As to Petitioner's reliance on Mr. Bernardez's testimony, the Sixth Circuit correctly points out that his testimony "would not alter the outcome of the case." (App. A, 29a, n. 5.)

In concluding that an agreement to arbitrate grievances existed between Petitioner and Respondent, the trial court relied on the *conduct* of the parties. Therefore,

Bernardez's testimony that Respondent never agreed to be bound by the no-strike provision is inapposite. The trial court concluded that Respondent accepted Petitioner's offer for interim employment "by continuing performance." (See Petition, App. B, p. 37a.) More importantly, the court found "most telling" the fact that "the employees continued to work for over 20 months under the imposed terms without violation of the no-strike clause." *Id.*

Therefore, it could not be more clear that ABS's argument that it was prejudiced by the consolidation is utterly without foundation and its petition should be denied.

CONCLUSION

The petition for certiorari should therefore be denied.

Respectfully submitted,

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